87-1803

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

UNITED STATES FIDELITY & GUARANTY COMPANY
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does the discretionary function exception to the Federal Tort Claims Act immunize the United States from liability for damages incurred as a result of negligence in its day-to-day operations at a hazardous waste clean-up site?

2. Is the absence of any consideration by a government employee of economic, social or political policy irrelevant to a Court's determination of the applicability of the discretionary function exception to the Federal Tort Claims Act?

LIST OF PARTIES

All parties are listed in the caption. Petitioner, United States Fidelity & Guaranty Company, has no parent company, subsidiary, or affiliate which must be listed pursuant to Rule 28.1.

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IN THE SUPREME COURT OF THE UNITED STATES
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vs.	:	
UNITED STATES OF AMERICA, Respondent	:	

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, United States Fidelity & Guaranty Company repectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on January 15, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 837 F. 2d 116 and is reprinted in the appendix hereto, page 1a infra.

The opinion of the United States District Court for the Middle District of Pennsylvania (Muir, D.J.) is reported at 638 F. Supp. 1068 and is reprinted in the appendix hereto, p. 17a infra.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1346(b), the Petitioner brought this suit in the Middle District of Pennsylvania. On November 17, 1986, the District Court entered final judgment in favor of the Petitioner and against the United States, awarding damages in the amount of $91,374.75. On January 15, 1988, the Third Circuit entered a judgment and opinion reversing the District Court's judgment. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §2674. Liability of the United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages...

28 U.S.C. §2680 Exceptions.

Provisions of this Chapter and §1346(b) of this title [28 U.S.C. §1346(b)] shall not apply to --

> (a) any claim based upon an act or omission of an employee of the government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

Drake Chemicals, Inc. operated a chemical manufacturing facility in Lock Haven, Pennsylvania, from 1961 until the company went bankrupt in 1981. When Drake ceased operations, it abandoned its manufacturing site, leaving numerous chemical drums, tanks, and reactors behind. The Pennsylvania Department of Environmental Resources inspected the Drake site and determined that the site posed a threat to the public health and to the environment. After attempting unsuccessfully to have Drake clean up the site, the Department requested the Environmental Protection Agency (EPA) to undertake a clean-up operation. In February, 1982, the EPA approved the Drake site for an "immediate removal action" pursuant to its authority under the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §9601-9657 (1982) (CERCLA). The EPA's clean-up operation at the Drake site was directed by an on-scene coordinator, an EPA employee, who selected OH Materials Handling Company

(OH Materials), a private chemical clean-up specialist, as the prime contractor, and numerous other EPA employees, remained at the Drake site throughout the clean-up operation. Pursuant to the terms of the contract between the EPA and OH Materials, and through the presence of EPA employees on site, the EPA retained responsibility and control for determining what work would be done, the scheduling of that work, the means and methods employed in disposing of waste, and the expenditures of OH Materials for material and manpower. The EPA retained the responsibility for public safety in connection with the operations on site, and directed and monitored the activities of OH Materials and other contractors on site.

One of the most serious hazards at the Drake site was an old railroad tank car, resting on raised concrete pedestals, and containing oleum, a form of concentrated sulfuric acid, which is extremely reactive with a wide range of compounds, including water. At the commencement of the clean-up operation, the oleum tank was venting directly into the atmosphere. The EPA was aware that the neutralization of the oleum tank posed a potential danger to the public inherent in the work, unless special precautions were taken.

OH Materials initially recommended that the tank be removed from its pedestals and transferred to a remote location, or, alternatively, placed on the ground at the rear of the Drake site prior to neutralization and removal of the oleum. This recommendation was rejected by the EPA. OH Materials then suggested neutralizing the oleum in the tank by slowly draining all of the liquid oleum from the tank through a valve at the bottom of the tank into a container of water, allowing the oleum to react with the water in a controlled fashion. The remaining sludge inside the tank would then be neutralized by slowly adding water to the tank. Following the completion of the chemical reaction, the neutralized sludge would be drained. The EPA's on-scene coordinator approved this plan.

On March 4, 1982, a hydrogeologist employed by the

Commonwealth of Pennsylvania issued a report recommending that the more hazardous operations at the Drake site, such as those involving the oleum, should be done on a sunny day with a north wind in excess of 3 knots. The reason for this recommendation was that the City of Lock Haven, with a population of approximately 15,000, is situated immediately to the north, west, and northeast of the Drake site, while areas to the south, southeast, and east of the site are sparsely populated. The on-scene coordinator was on notice of the hydrogeologist's report prior to the neutralization of the oleum tank.

On March 15, 1982, while the oleum was being drained from the tank through the bottom valve, a nut loosened and an uncontrolled flow of oleum, of approximately one quart to one gallon, dropped into the water tub below the tank. OH Materials personnel immediately tightened the valve, stopping the flow of oleum into the tank. However, the oleum hitting the water produced a dense acid cloud, which migrated off site, causing respiratory distress to five Pennsylvania Department of Transportation workers working in the City of Lock Haven. After this incident, the on-scene coordinator instructed OH Materials to continue neutralization of the oleum in the manner originally approved.

Eventually all liquid contents of the tank were drained. OH Materials then, at the direction and with the approval of the on-scene coordinator, began adding water to the tank, to neutralize the sludge. The product was then drained through the valve at the bottom of the tank. On March 23, 1982, the valve became clogged with sludge, and with the knowledge and approval of the EPA, OH Materials inserted rods through the manway at the top of the tank, seeking to clear the valve. Following the insertion of the rods, a steam explosion occurred in the tank, and a large acid cloud shot out of the manway. Blown by south-southwest winds, the acid cloud migrated into Lock Haven, causing property damage to over 500 motor vehicles, an airplane, and several buildings. Following the March 23

incident, the EPA's on-scene coordinator ordered that operations on the Drake site prone to the release of vapors would take place, henceforth, only when winds were blowing away from the city.

United States Fidelity & Guaranty Company (U.S.F. & G.), the insurer for OH Materials, paid and settled all of the claims of the public arising out of this March 23 incident. U.S.F. & G. then filed an administrative settlement claim with the EPA, which was denied. U.S.F. & G. then filed this suit against the United States on September 20, 1984, seeking recovery of its losses. The United States filed its Motion to Dismiss or for Summary Judgment on the grounds that the discretionary function exception to the Federal Tort Claims Act barred liability. This motion was denied by the District Court.

After trial, the District Court again concluded that the discretionary function exception did not appry, stating (pp33a-34a, infra):

> Perhaps the United States could have ignored the Drake site, but once it chose to clean-up the hazardous waste there, its decisions regarding the procedures to be followed were not of the nature and quality the Congress intended to shield from tort liability. United States v. S.A. Empresa De Viacao Area Rio Grandense (Varig Airlines), 104 S. Ct. 2755 (1984). The United States agrues that it cannot be held liable for any incidents which occurred as a result of the initial decision to clean-up the Drake site. The results of such a broad interpretation of the discretionary function exception could lead to results which Congress did not intend. The United States must be held accountable for the acts of its workers who carry out tasks on an operational level.

The District Court then concluded that the United States, and OH Materials, had been negligent in conducting the oleum neutralization operation without taking wind conditions into account.

In conducting a clean-up of materials which would

> explode and release hazardous chemicals into the air, the entities responsible for the clean-up have the duty to take all reasonable precautions so as to protect public safety...
>
> There is no evidence that the neutralization operations would have been more dangerous had the addition of water, draining the tank, and clogging of the valve, and other procedures involved in the neutralization been delayed so as to be performed on days with favorable wind conditions. (pp. 39a-40a). infra

The District Court found the United States 60% responsible for the damage arising out of the March 23 incident, and OH Materials 40% responsible, and entered judgment in favor of U.S.F. & G. for 60% of the damages claimed, or a total of $91,374.75.

The United States appealed from this judgment, and, on January 15, 1988, the Third Circuit entered an Opinion and Order, reversing the District Court on the grounds that the discretionary function exception to the Federal Tort Claims Act immunized the government in this case. According to the Third Circuit,

> It is irrelevant whether the government's employee actually balanced economic, social, and political concerns in reaching his or her decision. (p. 8a, infra)
>
> ...The fact that there was no evidence of an actual policy determination by the on-scene coordinator taking wind conditions into account does not affect the nature of the decision. (p. 14a, infra.)

The Third Circuit felt that the facts of this case were sufficiently similar to Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) as to mandate the immunization of the government from liability for its employee's negligence.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's analysis of the discretionary function exception conflicts in principle with that of other Circuits.

The Circuit Courts of Appeals have differed in their readings of the implications of this Court's decision in United States v. S.A. Empresa De Viacao Area Rio Grandense (Varig Airlines), 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984). The instant case illustrates how the Third Circuit's post-Varig approach to the discretionary function exception differs from that of other Circuits, in that the Third Circuit views as irrelevant whether the government action at issue actually was the product of considerations of policy; the Third Circuit allows governmental immunity when the government's lack of provision for public safety is potentially explained by an allocation of finite governmental resources; and the Third Circuit rejects this Court's decision in Indian Towing Company v. United States, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955) as having any continuing relevance to discretionary function analysis.

A. Relevance of the Government Actor's Actual Consideration of Policy.

The Third Circuit recognizes that the decision of this Court in Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) distinguishes between planning level decisions and operational decisions (p. 10a infra.). Planning level decisions will always be discretionary and immunized. On the other hand, some actions on an operational level will be immunized, and others will not, depending on whether the imposition of tort liability would involve the Court in judicial second guessing of social, political, and economic policy considerations bearing on the operational act.

> Acts at the operational level may be discretionary if planning level orders anticipate decisions at lower levels that leave room for policy judgment and decisions. (p. 11a infra.)

The Third Circuit views the governmental actions at issue in the instant case as being on the operational level, and recognizes that the government presented no evidence

that its failure to take wind direction into account was motivated by considerations of policy, citing

> the fact that there was no evidence of an actual policy determination by the on-scene coordinator taking wind conditions into account (p. 14a infra).

However, the Court holds that

> it is irrelevant whether the government employee actually balanced economic, social and political concerns in reaching his or her decision. (p. 8a infra).

Even though the specific operational act at issue was not motivated by policy considerations, the Court is willing to immunize the government since the action is susceptible to a policy analysis. The Court bases this view on its previous decision in Smith v. Johns Manville Corp., 795 F. 2d 301 (3d Cir. 1986) and decisions from other Circuits in Myslakowski v. United States, 806 F. 2d 94 (6th Circuit 1986, cert. denied _____ U.S. _____, 107 S. Ct. 1608, 94 L. Ed. 2d 793 (1987); Allen v. United States, 816 F. 2d 1417 (10th Cir. 1987); In re Consolidated United States Atmospheric Testing Litigation, 820 F. 2d 982 (9th Cir. 1987), cert. denied sub nom Konizeski v. Livermore Labs, _____, U.S. _____, 108 S. Ct. 1076, _____ L. Ed 2d _____ (1988).

In contrast to this analysis of the discretionary function exception, the 11th Circuit, in Alabama Electric Cooperative, Inc. v. United States, 769 F. 2d 1523 (1985) allows for the imposition of liability against the government, based on the government's failure to demonstrate that its operational actions were actually motivated by considerations of social, economic or political policy. The Alabama Electric case concerned the erosion of downstream property caused by the Army Corps of Engineers' construction of dikes in the Alabama River. The 11th Circuit there recognizes that decisions concerning the design of a particular Corps project could be based on considerations of social, economic and political policy, entitling the government to immunity:

> We hold that where the Corps make a social, economic or political policy decision concerning the design of a particular project, that decision is excepted from judicial review under §2680(a). In the absence of such a policy decision, the Corps' design decisions are subject to judicial review under the state law tort standards that would normally govern an action for engineering malpractice.
>
> Alabama Electric Cooperative, Inc., supra, 769 F. 2d at 1536-1537.

The 11th Circuit distinguishes the Alabama Electric Cooperative, Inc. case from its previous decision in Payne v. United States, 730 F. 2d 1434 (11th Cir. 1984), noting that in Payne, where the government was immunized by the Court,

> the Court did consider the fact that its actions would likely cause erosion and encroachment in some areas. In Payne, however, the Corps made a policy decision not to determine precisely where the harm would occur, and thus the propriety of that decision is not subject to judicial review. In contrast, the District Court may find on remand in this case either that the Corps never considered the possibility that the dikes they planned to construct might adversely affect the opposite river bank, or otherwise made no policy decision not to determine the harm to the opposite bank.
>
> Alabama Electric Cooperative, Inc., supra, 769 F 2d at 1535 N. 7. (emphasis in original).

The 11th Circuit thus imposes on the government the burden of demonstrating that its actions were motivated by policy consideratons, in order to be entitled to immunity. In contrast, the Third Circuit will immunize the government based, not on the record before it, but on the Court's capability for hypothesizing after the fact a policy consideration which could have motivated governmental action. Obviously, the Third Circuit approach will immunize the government in more instances. While the Third Circuit's

concern, is, of course, with judicial interference in governmental policy making, it is hard to see how judicial review unduly restricts or intimidates the government employee, if no policy consideration has actually taken place.

B. Allocation of Finite Governmental Resources

The Court hypothesizes the following policy rationale for the on-scene coordinator's failure to take wind direction into account in scheduling the neutralization operation:

> In this context, one would expect the scheduling decision to reflect not only the available resources and the other hazards to be neutralized on the site, but most importantly, a balancing of the risks of proceeding with the neutralization on the day chosen against the risks of further delay. (p. 13a infra).

The Third Circuit's grant of immunity is thus based, in part, on the hypothesis, unsubstantiated by the evidence, that the government's failure to take wind direction into account could have been motivated by a policy concern with the allocation of scarce governmental resources. Other Circuit Courts have rejected the government's contention that a failure to adequately insure public safety becomes an immunized discretionary decision by potentially implicating a policy question concerning the allocation of finite governmental resources. In Denham v. United States, 834 F. 2d 518 (5th Cir. 1987), a case involving an injury resulting from a dangerous condition in a federally owned swimming area, the government contended,

> The decision not to check the swimming area for underwater hazards was itself discretionary and hence could not be the basis for imposing liability under the FTCA. We do not agree. The government's approach would subsume practically any decision within the discretionary function exception and thereby vitiate the FTCA. Denham, supra, 834 F. 2d at 520.

Similarly, in Eklof Marine Corps v. United States, 762 F. 2d 200 (2d Cir. 1985), wherein the Court holds the government susceptible to a tort action for its alleged negligent

marking of a navigational hazard, the Court rejects the concern that allowing such actions to proceed to judgment will result in improper judicial interference with the allocation of finite resources.

Eklof Marine Corps, supra, 762 F. 2d at 204.

Cf. Brown v. United States, 790 F. 2d 199 (1st Cir. 1986), immunizing the United States from liability for its negligence in maintaining a weather observation buoy.

Certainly there are situations where the government does indeed engage in a cost-benefit analysis leading to a policy decision to accept certain risks to the public arising from its activities, in order to save expense or time or promote some other public benefit. Thus in U.S. v. Varig Airlines, supra, the FAA made a policy decision in favor of its spot check program. In Dalehite v. United States, supra, government employees decided to bag fertilizer at high temperatures after specifically considering that bagging at lower temperatures "would result in greatly increased production costs and/or greatly reduced production." Dalehite, supra, 346 U.S. at 41. In both cases, the government substantiated its contention that concern with the allocation of scarce governmental resources, and with the expeditious progress of the government activity, had explicitly motivated the challenged action. In contrast, the Third Circuit in this case is willing to immunize the government on the basis of a judge's being able to discern some increased costs to the government if the safety precautions at issue had been instituted. The exercise of due care in connection with government activities will consistently impose additional cost on the government, and the Third Circuit's approach to the discretionary function exception allows the exception to come close to swallowing the Federal Tort Claims Act.

C. Planning/Operation Dichotomy.

In the instant case, the Third Circuit indicates that the decision of this Court in Indian Towing Company v. United States, supra, is not pertinent to interpreting discretionary

function exception. In contrast, other Circuits have continued to follow the analysis suggested by Indian Towing Company. That test has the advantage of simplicity: The government's decision to embark upon a particular action or program is discretionary, but once it decides to act, it is obliged to do so with due care. This analysis is employed by the Second Circuit in Caraballo v. United States, 830 F. 2d 19 (2d Cir. 1987), see also, Denham v. United States, supra; Eklof Marine Corps v. United States, supra; Cf. Brown v. United States, supra. Thus, a conflict in principle exists among the Circuits as to the continuing validity of the planning/operational dichotomy, which was suggested in Dalehite and formed the basis of decision in Indian Towing Company.

II. The decision below, immunizing the government from liability from its operational negligence in connection with the chemical waste disposal project, raises important and potentially recurrent problems.

In United States v. Varig Airlines, supra, this Court held that the discretionary function exception immunized the government from damages allegedly resulting from the negligence of the Federal Aviation Administration, in certifying as safe an airplane which failed to comply with governmental fire protection standards. An unanimous Court there stated,

> ...whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the government acting in its role as a regulator of the conduct of private individuals.
> United States v. Varig Airlines, supra, 467 U.S. at 816 (footnote omitted).

Allowing for the imposition of liability in the Varig situation would carry with it vast implications for governmental regulatory activity, making the government an insurer of private parties' compliance with whatever safety regulations the government might enact. If liability had been imposed on the government in Varig, any govern-

mental agency engaged in the promulgation of safety regulations would have to insure that it had adequate manpower to rigorously enforce the safety regulation, or face liability for private parties' noncompliance. Such liability would constitute a dramatic disincentive to governmental safety regulation.

Narrowly interpreted, the dictate of Varig is limited to insulating the government from liability for regulation of private activity. Varig differs from the instant case in that here, the government was the instigator and active director of and participant in the project causing injury, as opposed to merely being involved as a regulator of private conduct. Notwithstanding the potentially narrow applicability of Varig, the Third Circuit, in the instant case, has interpreted the Varig decision as restricting the scope of the Federal Tort Claims Act to all but the most mundane of torts such as auto accidents. In all but such mundane torts, application of the Third Circuit's analysis of the discretionary function exception will allow a judge to hypothesize some policy implications potentially underlying the decision - if nothing else, a concern with allocation of government resources. Other Courts have not seen the Varig decision as having substantial impact on tort claims outside the regulatory sphere. See, e.g., the concurring opinion of Judge Brown in Collins v. United States, 783 F. 2d 1225, at 1231 (5th Cir. 1986) (holding the United States liable for failing to reclassify a mine as gassy) wherein Judge Brown states,

> The FTCA is not, as government counsel think and continue to urge, confined to the typical fender-bender automobile intersectional collision between a postal truck and a citizen's child-filled stationwagon. We still have the significant still valid decisions in Indian Towing, [350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 38 (1955)] Rayonier [Rayonier, Inc v. United States, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 22 354 (1957)] and Eastern Airlines, [Eastern Airlines, Inc. v. Union Trust Company, aff'd sub nom., United States v. Union Trust Company,

350 U.S. 907, 76 S. Ct. 192, 100 L. Ed. 796 (1955)] which recognized FTCA liability in areas traditionally thought to have some governmental activity immunity that inherently involved extensive operational judgment, and hence, "discretion."

The expansive interpretation of the discretionary function exception adopted by the Third Circuit in the instant case would preclude virtually any injury and damage claim arising out of governmental activities in the field of hazardous waste disposal. It would be a rare situation in the chemical waste disposal field where a Court, reviewing the government's failure to take adequate precautions for the surrounding citizenry, could not hypothesize some policy implications involving the more rapid completion of the clean-up task, or the minimizing of the expenditure of governmental resources. The Third Circuit's discretionary function exception analysis essentially renders those citizens injured or damaged by governmental hazardous waste clean-up activity without a remedy against the government.

This Court in Varig recognizes that the Court's primary concern, in interpreting the discretionary function exception, is to define congressional intent.

> The basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee - whatever his or her rank - are of the nature and quality that Congress intended to shield from tort liability.
>
> Varig Airlines, supra, 467 U.S. at 816.

It is safe to assume that Congress, when enacting the Federal Tort Claims Act in 1946, did not consider whether governmental handling of chemical waste should be shielded from tort liability. The buildup of chemical waste in this country was not, at that time, an area of public concern or active governmental involvement. Subsequent to the enactment of the Federal Tort Claims Act, Congress has not legislatively addressed the question of the potential liability

of the United States for personal injury or property damage caused by the government's negligence in a chemical waste clean-up operation. [1]

The Courts have recognized that in enacting the Federal Tort Claims Act, with the discretionary function exception, Congress was engaged in balancing the rights of the citizenry to be compensated when injured or damaged by governmental negligence against the interference with governmental decision making which could arise from the threat of tort litigation. The Congress sought to achieve this through a system which dispensed with a costly and time consuming method of private bills. See Collins v. United States, supra, 783 F. 2d at 1233.

In discussing the closely related field of judicially created immunity for discretionary acts of federal officials, this Court, in Westfall v. Irwin, _____ U.S. _____, 108 S. Ct. 580, at 583, 98 L. Ed. 2d 619 (1988), recognized the governmental interest in insulating "the decision making process from the harassment of prospective litigation", but further observed:

> that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct.

See also, Forrester v. White, _____ U.S. _____, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

Petitioner contends that the Third Circuit, in the instant case, adopted a mode of analysis which fails to appropriately

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[1] The CERCLA statute, pursuant to which the United States undertook the Drake Chemical Clean-up, does have certain liability provisions, establishing a system of essentially strict liability for clean-up costs and damage to natural resources. However, those liability provisions are inapplicable to the present action, since this action concerns claims for private property damage. The CERCLA statute does not subject the agencies of the United States to the same potential liability as any non-governmental entity, for claims which, unlike the instant claim, fall with CERCLA's liability provisions. See 42 U.S.C. §9607(g).

balance the competing interests. When a governmental employee's failure to take appropriate precautions for the protection of the public is not actually motivated by any consideration of public policy, the immunization of the government does not serve its intended purpose. Where no policy decision has been made, immunizing the government does not protect the policy making process. The Third Circuit's decision fails to give appropriate weight to the interests of the citizenry in deterring governmental negligence, and in being compensated for losses which result from governmental negligence. The decision allows the EPA to ignore the welfare of the population residing in the vicinity of hazardous waste clean-up sites.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. The opinion of the Third Circuit should be reversed and the case remanded to the Third Circuit for consideration of the other issues which the United States raised in its appeal below.

Respectfully submitted,

LIEBERT, SHORT,
FITZPATRICK & HIRSHLAND

By: _____

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87 1803

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UNITED STATES FIDELITY & GUARANTY COMPANY
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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-5073

UNITED STATES FIDELITY
& GUARANTY COMPANY

vs.

UNITED STATES OF AMERICA,

Appellant

Appeal From The United States District
Court For The Middle District
Of Pennsylvania (Scranton)
(D.C. Civil No. 84-1255)

Argued September 9, 1987

BEFORE: SLOVITER, and STAPLETON,
Circuit Judges, and
FISHER, *District Judge*•

(Opinion filed January 15, 1988)

Jonathan E. Butterfield (Argued)
Liebert, Short, Fitzpatrick &
Hirshland
30 West Third Street
Williamsport, PA 17701

Attorney for Appellee

• Honorable Clarkson S. Fisher, United States District Judge for the District of New Jersey (Trenton), sitting by designation.

Richard K. Willard
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James J. West
United States Attorney

Jeffrey Axelrad
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Attorneys for Appellant

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

The United States Fidelity & Guaranty Company (U.S.F.&G.) instituted this action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982). The action seeks recovery for losses arising from an accident that occurred during the cleanup of an abandoned chemical facility. After trial, the district court held that U.S.F.&G. could recover. Because we hold that the discretionary function exception, 28 U.S.C. § 2680(a) (1982), bars recovery against the United States in this case, we will reverse.

I.

The district court found the following facts. Drake Chemicals, Inc. (Drake) operated a chemical manufacturing facility in Lock Haven, Pennsylvania from 1961 until the company went bankrupt in 1981. When Drake ceased operations, it abandoned its manufacturing site, leaving numerous chemical drums, tanks, and reactors behind. The Pennsylvania Department of Environmental Resources inspected the Drake site and determined that the site posed a threat to the public health and to the environment. After attempting unsuccessfully to have Drake clean up the site, the Department requested the Environmental Protection Agency (EPA) to undertake a cleanup operation.

In February 1982, the EPA approved the Drake site for an "immediate removal action" pursuant to its authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982) (CERCLA). The EPA typically undertakes an immediate removal action only if it determines that a response is needed within hours or days to prevent or mitigate significant harm to the public health or to the environment. After conducting an investigation, the EPA concluded that an imminent threat of fire and explosion existed at the Drake site, as well as a threat of public contact with hazardous chemicals.

The immediate removal action at the Drake site was directed by an On Scene Coordinator, an EPA employee, who selected OH Materials Handling Company (OH Materials), a private cleanup specialist, as the prime contractor for cleaning up the Drake site. The On Scene Coordinator had primary responsibility for determining the nature and scheduling of the work to be done, the means of disposing of waste, and the expenditures of OH Materials for materials and

manpower. In particular, the On Scene Coordinator had responsibility for directing and monitoring the activities of OH Materials.

One of the most serious hazards at the Drake site was an old railroad tank car resting on raised concrete pedestals. The tank contained oleum, a solution of sulfur trioxide in concentrated sulfuric acid, which is extremely reactive with a wide range of compounds and sensitive to moisture. At the commencement of the removal action, the oleum tank was venting directly into the atmosphere and posed a major threat of fire, explosion, and release of pollutants.

OH Materials suggested that the tank be removed from its pedestals and transferred to a remote location, or alternatively placed on the ground at the rear of the Drake site prior to neutralization and removal of the oleum. The On Scene Coordinator rejected these recommendations after considering the potential risks from moving the tank. OH Materials then suggested neutralizing the oleum in the tank by slowly draining all of the liquid oleum from the tank through the bottom valve into a container of water and allowing the oleum to react with the water in a controlled fashion. The remaining sludge inside the tank would then be neutralized by slowly adding water to the tank. Following the completion of the chemical reaction, the neutralized sludge would be drained. The On Scene Coordinator approved this plan.

On March 4, 1982, a hydrogeologist employed by the Commonwealth issued a report recommending that the more hazardous operations at the Drake site, such as those involving oleum, should be done on a sunny day with a north wind in excess of three knots. The reason for this recommendation was that the City of Lock Haven, with a population of approximately 15,000, is situated immediately to the north, west, and northeast of the Drake site, while areas to the south,

southeast, and east of the site are sparsely populated. The On Scene Coordinator was on notice of the hydrogeologist's report prior to the neutralization of the oleum tank.

On March 15, 1982, while the oleum was being drained from the tank through the bottom valve, a nut loosened and an uncontrolled flow of oleum escaped and began to react with the water in the tub below the tank. Employees of OH Materials tightened the valve, but not before a dense cloud of sulfur trioxide and sulfuric acid formed and migrated toward Lock Haven. Five Pennsylvania Department of Transportation workers suffered respiratory distress from exposure to the acid cloud.

After this incident, the On Scene Coordinator met with OH Materials and decided to continue neutralization in the manner originally approved. OH Materials proceeded to add water gradually to the oleum tank until the tank was completely filled with water and all evidence of reaction between the water and the contents of the tank ceased. OH Materials then began draining the supposedly neutralized material through the bottom valve.

On March 23, 1982, drainage stopped because the valve had become clogged with sludge. To clear the valve, OH Materials employees inserted rods through the manway at the top of the tank. Following the insertion of the rods, a steam explosion occurred in the oleum tank. A large cloud of sulfur trioxide and sulfuric acid escaped out of the manway. Blown by south-southwest winds, the acid cloud migrated into Lock Haven, where it caused property damage to over 500 motor vehicles, an airplane, and several buildings.

U.S.F.&G., the insurer for OH Materials, paid out $133,296.97 in claims arising out of the March 23 incident. U.S.F.&G. filed an administrative settlement claim with the EPA, which the EPA denied. U.S.F.&G.

then filed this suit against the United States on September 20, 1984, seeking recovery of its losses from the March 23 incident. On February 13, 1986, without having submitted a separate administrative claim to the EPA, U.S.F.&G. filed an amended complaint adding a claim for $5000 of personal injury losses arising out of the March 15 incident. The United States then filed a motion to dismiss or for summary judgment on the ground that the discretionary function exception barred liability. The district court denied this motion.

After trial, the district court again concluded that the discretionary function exception did not apply. *See United States Fidelity & Guar. Co. v. United States*, 638 F. Supp. 1068, 1077 (M.D. Pa. 1986). In addition, the court dismissed the personal injury claims arising out of the March 15 incident, because U.S.F.&G. never submitted these claims to the EPA as required by 28 U.S.C. § 2675 (1982). *See id.* at 1077-78. With respect to the March 23 incident, the court rejected the arguments that the United States was negligent in leaving the oleum tank on its pedestals before neutralization and in continuing with the neutralization procedure after the March 15 incident. *See id.* at 1079-80. The court did find, however, that the United States was negligent in "failing to take wind conditions into account while supervising the neutralization of the oleum tank." *Id.* at 1084. The court held that the Government was liable for 60% of the damage arising out of the March 23, 1982 incident.

The United States appeals on several grounds. We address only the Government's contention that the discretionary function exception bars recovery, because our disposition of this issue renders unnecessary a discussion of the other issues raised on appeal. The scope of review of the applicability of the discretionary function exception is plenary. We have jurisdiction under 28 U.S.C. § 1291 (1982).

II.

The Federal Tort Claims Act waives the sovereign immunity of the United States in claims "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b) (1982). The statute, however, contains an exception for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1982). If governmental conduct falls within the discretionary function exception, it is irrelevant whether the United States abused its discretion or acted negligently.

In defining the scope of the discretionary function exception, the Supreme Court has recently stated the general rule that

> it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. . . . Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee--whatever his or her rank--are of the nature and quality that Congress intended to shield from tort liability.

United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813, 104 S.Ct. 2755, 2764 (1984).

Varig reaffirmed the construction of the discretionary function exception set forth in *Dalehite v. United States*, 346 U.S. 15, 28, 73 S.Ct. 956, 964 (1953). *Dalehite* held that governmental conduct

falling within the discretionary function exception "includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion." *Id.* at 35-36, 73 S.Ct. at 968 (footnote omitted), *quoted in Varig*, 467 U.S. at 811, 104 S.Ct. at 2763. The purpose of exempting decisions in which there is room for policy judgment and decision is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Varig*, 467 U.S. at 814, 104 S.Ct. at 2765.

In interpreting the Supreme Court's pronouncements in *Dalehite* and *Varig*, this court has developed several principles for determining whether governmental conduct is discretionary within the meaning of the exception. In the first place, conduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation. Federal officials do not possess discretion to violate constitutional rights or federal statutes. *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir.), *cert. denied*, 107 S.Ct. 175 (1986). In addition, an agency's violation of its own mandatory regulations is not a discretionary act. *Berkovitz by Berkovitz v. United States*, 822 F.2d 1322, 1332 (3d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3271 (U.S. Sept. 25, 1987) (No. 87-498).

Second, it is irrelevant whether the government employee actually balanced economic, social, and political concerns in reaching his or her decision. In *Smith v. Johns-Manville Corp.*, 795 F.2d 301, 308-09 (3d Cir. 1986), we stated that "[t]he test is not whether the government actually considered each possible alternative in the universe of options, but whether the

conduct was of the type associated with the exercise of official discretion." This rule corresponds with the holdings of several other courts of appeals. In *Myslakowski v. United States*, 806 F.2d 94, 97 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1608 (1987), the Court of Appeals for the Sixth Circuit held that

> even the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made.
>
> Indeed, it is, in part, to provide immunity against liability for the consequences of negligent failure to consider the relevant, even critical, matters in discretionary decisionmaking that the statutory exception exists. If it were otherwise, a judgment-based policy determination made at the highest levels, to which all would concede that the statutory exception applies (the decision to sell surplus jeeps), would result in no immunity if the decision could be shown to have been made without consideration of important, relevant factors, or was a decision negligently reached. If that reasoning were sound, the discretionary function exception would be inapplicable in every case in which a negligent "failure to consider" a relevant risk could be proved.

Accord Allen v. United States, 816 F.2d 1417, 1422 n.5 (10th Cir. 1987) (quoting *Myslakowski* and stating that it is "irrelevant whether the alleged failure to warn was a matter of 'deliberate choice' or a mere oversight"), *petition for cert. filed*, 56 U.S.L.W. 3171 (U.S. July 20, 1987) (No. 87-316); *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 998 & n.19 (9th Cir. 1987) (quoting *Allen* and *Myslakowski* and holding that the exception "does

not require an analysis of the decisionmaking process"). Thus, the relevant question is not whether an explicit balancing is proved, but whether the decision is susceptible to policy analysis.

Third, although the discretionary function exception "plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals," *Varig*, 467 U.S. at 813-14, 104 S.Ct. at 2764, regulatory conduct is neither necessary nor sufficient for the application of the discretionary function exception. Not all regulatory acts are discretionary. *See Berkovitz*, 822 F.2d at 1327-28. Moreover, not all conduct falling within the exception is regulatory. Acts of a governmental nature also include "'other administrative action not of a regulatory nature, such as the expenditure of Federal Funds, the execution of a Federal project and the like.'" *Dalehite*, 346 U.S. at 27, 73 S.Ct. at 963 (quoting Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea)) (footnote omitted), *quoted in Varig*, 467 U.S. at 810, 104 S.Ct. 2762.

Finally, the decisions of the Supreme Court and this court reveal that the dichotomy between planning level and operation level conduct does not resolve the question of whether a governmental act is discretionary within the meaning of the exception. Although the Supreme Court in *Dalehite* did suggest that planning level decisions are discretionary and distinguished these decisions from operational decisions, *see* 346 U.S. at 42, 73 S.Ct. at 971, *Dalehite* neither states nor implies that all operational decisions are nondiscretionary. In fact, *Dalehite* states that "[n]ot only agencies of government are covered [by the exception] but all employees exercising discretion." *Id.*

at 33, 73 S.Ct. at 966-67 (footnote omitted). *Varig* reinforced this conclusion by putting the focus on "the nature of the conduct, rather than the status of the actor." 467 U.S. at 813, 104 S.Ct. at 2764.

In addition, this court in *Berkovitz* noted that operational conduct can be discretionary within the meaning of the exception. 822 F.2d at 1329. Acts at the operational level may be discretionary if planning level orders anticipate decisions at lower levels that leave room for policy judgment and decision. *See Pooler*, 787 F.2d at 871 (officer in charge of investigation had discretion in deciding how to pursue investigation, since "he had to exercise judgment as to the policy decision to use an informant and as to the extent of control which should be maintained over the selected informant"). Moreover, operational acts mandated by orders of planning level superiors are protected by the exception even though the actual actor does not exercise discretion. *Dalehite*, 346 U.S. at 36, 73 S.Ct. at 968 ("acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable"), *cited in Varig*, 467 U.S. at 820, 104 S.Ct. at 2768.

III.

With these principles in mind, we now turn to the specific facts of this case. Although the complaint alleged several theories of negligence on the part of the United States, the district court found the Government negligent only in its conduct concerning the timing of the neutralization of the oleum tank. In particular, the district court held that the Government should have scheduled the oleum removal operation at a time when the wind was not blowing toward the city. Since U.S.F.&G. does not appeal the district court's holding, we restrict our discussion to this single decision by the Government.

In *Dalehite*, the Supreme Court found that the Government's conduct in manufacturing fertilizer and loading it onto a ship where it later caught fire and exploded was protected by the discretionary function exception. The fertilizer, which contained an explosive ammonium nitrate base, had been manufactured and was being shipped pursuant to a federal program the ultimate objective of which was to provide food for countries occupied by the United States after World War II. One of the negligent acts found by the district court to be a proximate cause of the explosion was a decision by the Field Director of Ammunition Plants to bag the fertilizer at a temperature of 200 degrees Fahrenheit. The Supreme Court held this decision to be within the discretionary function exception because it was the kind of decision that required the decisionmaker to weigh the risk of fire and explosion inherent in bagging at this temperature against the "greatly increased production costs and/or greatly reduced production" that would attend bagging at a lower temperature. 346 U.S. at 41, 73 S.Ct. at 970. The Supreme Court observed that "[t]his kind of decision is not one which the courts, under the Act, are empowered to cite as 'negligence.'" *Id.*

We perceive no material distinction between the decision challenged in *Dalehite* and the one attacked here. The objective of this phase of the CERCLA program is to protect the public from the dangers of abandoned toxic waste. Execution of that program and accomplishment of its objective necessarily require the setting of priorities in light of the risks presented at various sites and the finite resources available to address the problem. In this instance, the EPA classified the cleanup operation at the Drake site as an "immediate removal action." The agency thus determined that significant risks would attend a delay in cleanup.

With this hazard identified and this priority fixed, the On Scene Coordinator was dispatched with authority to determine how to schedule the cleanup operations at the Drake site in a manner that would most safely and effectively minimize the risk of serious injury to the public. In particular, the On Scene Coordinator faced the problem of when to schedule the neutralization of an oleum tank that was venting directly into the atmosphere and posed a major threat of fire, explosion, and release of pollutants into the air. In this context, one would expect the scheduling decision to reflect not only the available resources and the other hazards to be neutralized on the site, but most importantly, a balancing of the risks of proceeding with the neutralization on the day chosen against the risks of further delay. Thus the authority delegated to the On Scene Coordinator left room for, and indeed required, the exercise of policy judgment based upon the resources available and the relative risks to the public health and safety from alternative actions.

As a result, we view the challenged decision here as involving as much or more of a discretionary function as the bagging temperature decision in *Dalehite*. In the words of *Dalehite*, the On Scene Coordinator's alleged negligence came in the context of "the execution of a Federal project," 346 U.S. at 27, 73 S.Ct. at 963, and involved a "determination[] made by . . . [an] administrator[] . . . establishing . . . [a] schedule[] of operations", *id.* at 35-36, 73 S.Ct. at 968, for the project. Under the Act, we are not "empowered to cite as 'negligence,'" *id.* at 41, 73 S.Ct. at 970, such a decision.

In its opinion, the district court acknowledged that "[i]t is conceivable that under certain circumstances the hazard posed by a tank would be so great that removal operations would have to proceed immediately

and without regard to wind conditions." 638 F. Supp. at 1080. But the court went on to second-guess the On Scene Coordinator's decision in this particular case by finding it to be negligent. Under this court's analysis in *Smith*, however, the fact that there was no evidence of an actual policy determination by the On Scene Coordinator taking wind conditions into account does not affect the nature of the decision. Once the district court found that there could be room for a policy judgment, it should have ended its analysis.

None of the circumstances rendering governmental conduct nondiscretionary was present in this case. There was no applicable constitutional provision, statute, or regulation requiring the On Scene Coordinator to undertake removal actions only on days with favorable wind conditions. The report of the Commonwealth's hydrogeologist did not impose a nondiscretionary, mandatory duty on the On Scene Coordinator. The report represented the opinion of one expert that the On Scene Coordinator had the authority to accept, reject, or balance against other considerations.

In addition, U.S.F.&G. does not suggest that the On Scene Coordinator's decision involved any violation of a superior's instructions. CERCLA and the EPA give the On Scene Coordinator broad responsibility to formulate the best means of achieving the statute's goals. Thus, even if the On Scene Coordinator's decision could be classified as operational, it was nevertheless discretionary. The timing decision was one that called for a policy judgment.

U.S.F.&G. cites two Supreme Court cases in response to the analysis set forth above: *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122 (1955) and *Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S.Ct. 374 (1957). In *Indian Towing*, the Supreme Court held that the Government could be held liable for the Coast Guard's negligence in

operating a lighthouse. In *Rayonier*, the Court held that the Government could be held liable for the negligence of Forest Service employees in fighting fires originating on federal lands. But these cases do not control here because neither one involves an interpretation of the discretionary function exception. The Court in *Varig* distinguished *Indian Towing* because the Government in that case conceded that the discretionary function exception did not apply, and argued instead (to no avail) that the Coast Guard was protected against liability in the operation of a lighthouse because it was a "uniquely governmental function." 467 U.S. at 812, 104 S.Ct. at 2763. The *Varig* Court distinguished *Rayonier* because *Rayonier* did not discuss or rely upon the discretionary function exception; rather, it relied on, and overruled *Dalehite*'s reading of, 28 U.S.C. § 2674, which allows recovery against the United States "in the same manner and to the same extent as a private individual under like circumstances." *Rayonier* held only that under the Act the United States cannot claim immunity from liability for the negligence of its fire fighters on the ground the local governments generally enjoy such immunity for the negligence of their fire fighters. *See Varig*, 467 U.S. at 813 n.10, 104 S.Ct. at 2764 n.10. We must adhere to the Court's admonition in *Varig* that the principles developed in *Dalehite* still govern the interpretation of the discretionary function exception. *Cf. Mahler v. United States*, 306 F.2d 713, 723 n.13 (3d Cir. 1962) (decided before *Varig*, stating that *Dalehite*'s approach to analyzing the discretionary function exception survived *Indian Towing* and *Rayonier*).

IV.

Because the discretionary function exception bars recovery against the United States in this case, the decision of the district court will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil No. 84-1255

JUDGMENT

This action came on for trial before the Court, the issues having been duly tried and decisions having been duly rendered. Accordingly, pursuant to this Court's Opinion and order of July 3, 1986, as amended by Orders filed on July 3, 1986 and on August 7, 1986, the Opinion and Order of October 24, 1986, and the Stipulation Pertaining to Damages filed by the parties,

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff, United States Fidelity & Guaranty Company, recover from the Defendant, United States of America, the sum of $91,374.75.

Done this 17th day of November, 1986, at Williamsport, Pennsylvania.

UNITED STATES DISTRICT JUDGE

FILED
Williamsport, Pa.
Nov. 17, 1986
DONALD R. BERRY, Clerk

OPINION

MUIR, District Judge.

I. Introduction

On September 20, 1984, the United States Fidelity & Guaranty Company (hereafter "U.S.F. & G") filed the complaint in this action against the United States of America seeking recovery pursuant to the Federal Tort Claims Act, 28 U.S.C. §2671, et seq. Recovery was sought for losses which occurred as a result of a release of an acid cloud on March 23, 1982 during the clean-up of a tank containing hazardous chemical waste at the site of Drake Chemicals, Inc. in Lock Haven, Pennsylvania. On February 13, 1986, an amended complaint was filed adding a claim for $5,000 of personal injury losses which occurred as a result of another release of a sulphuric acid cloud from the same tank. On February 28, 1986, the United States filed a motion to dismiss or for summary judgment based upon its assertion that the challenged acts of the Environmental Protection Agency (hereafter "EPA") fall within the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. §2671, et seq. By opinion dated April 16, 1986, this Court denied the motion, ruling that the discretionary function exception does not apply in this case.

The case was bifurcated for trial between the issues of liability and damages and the liability phase of the case was tried to the Court from June 2 through 6, 1986. The Court's findings of fact, discussion, and conclusions of law as to liability follow.

II. Findings of Fact.

The parties submitted undisputed findings of fact which have been adopted by this Court. The letter "U" for "Undisputed" follows such findings.

1. Plaintiff, the United States Fidelity & Guaranty Company (hereinafter "U.S.F. & G.") is a corporation engaged in the insurance business. (U)

2. The Defendant is the United States of America, acting through its Environmental Protection Agency (hereinafter "EPA"). (U)

3. At all times material to this action, U.S.F. & G. was the insurer of the OH Materials Handling Company, a

division of KBI, Inc. (hereinafter referred to as "OH Materials"), pursuant to a liability insurance policy issued by U.S.F. & G. to KBI, Inc. (U)

4. OH Materials, as relevant to this litigation, is engaged in the business of containing, abating, and cleaning up hazards posed by chemical waste. (U)

5. Drake Chemicals, Inc. is a corporation which operated a chemical manufacturing facility in Lock Haven, Pennsylvania, from 1961 to August, 1981. (U)

6. In or around August, 1981, Drake Chemicals, Inc. ceased operations and filed a petition in bankruptcy. (U)

7. At the time it discontinued its operations, Drake Chemicals abandoned its manufacturing site, leaving numerous chemicals, drums, and reaction vessels at the site (hereinafter referred to as "Drake site"). (U)

8. The Pennsylvania Department of Environmental Resources (hereinafter "Department of Environmental Resources") inspected the Drake Chemicals site and determined that it posed a threat to the public health and the environment. (U)

9. On January 5, 1982, the Department of Environmental Resources ordered Drake Chemicals to clean up the Drake site. (U)

10. Drake Chemicals responded to the orders of the Department of Environmental Resources by advising that it lacked the financial resources to clean up the site. (U)

11. In February of 1982, the Department of Environmental Resources requested that EPA consider the Drake site for emergency funding of a cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (hereinafter "the Act"), 42 U.S.C. §9601 et seq. (U)

12. The Act is a federal program which provides authority to the federal government to clean up sites which it has determined pose an imminent threat of harm or endangerment to the public health and the environment. (U)

13. Cleanups under the Act of sites such as the Drake site are administered by EPA. (U)

14. The Act authorizes removal and remedial actions as responses to potential hazards. (U)

15. "Removal" actions under the Act are relatively short-term responses and include "immediate" and "planned" removals. (U)

16. The Drake Chemicals site was considered by EPA for an immediate removal action under the Act. (U)

17. Immediate removal actions are undertaken only if a response is needed within hours or days to prevent or mitigate significant harm to human health or the environment and such actions will not otherwise be provided on a timely basis. (U)

18. Generally, immediate removal actions cannot continue for longer than 6 months or exceed $1,000,000 in costs unless a special exception is given by the Administrator of EPA. (U)

19. EPA's participation in removal actions is controlled by an On Scene Coordinator. (U)

20. The On Scene Coordinator directs federal removal efforts financed by the Act and coordinates all other efforts at the scene of the removal activity. (U)

21. Federally funded removal actions are performed by independent contractors selected by the On Scene Coordinator from a list of contractors which EPA has determined have the resources and experience to carry out the removal. (U)

22. In February of 1982, the Department of Environmental Resources and EPA inspected the Drake site and observed over 3,000 drums, and various reactors and tanks, containing hazardous chemicals. (U)

23. Many of said drums, reactors and tanks were in a deteriorating condition. (U)

24. Previous investigations at the Drake site had revealed ground water contamination and poor air quality in the area.

25. After these investigations, the EPA, through its On Scene Coordinator, concluded that there existed at the Drake site an imminent threat of fire and explosion as well as a threat of direct public contact with hazardous chemicals, all of which constituted a severe threat to the public health. (U)

26. The City of Lock Haven, with a population of approximately 15,000, is situated immediately to the north, west, and northeast of the Drake site. (U)

27. Areas to the south, southeast, and east of the Drake site are sparsely populated.

28. The EPA's On Scene Coordinator issued oral and written demands to the owners of Drake Chemicals, Inc. to clean up the site.

29. When the owners of Drake Chemicals refused to clean up the Drake site, the On Scene Coordinator requested approval from the EPA Office of Emergency and Remedial Response to undertake an immediate removal action. (U)

30. On February 26, 1982, the On Scene Coordinator received authorization to undertake immediate removal activities at the Drake site. (U)

31. Thereafter, in conjunction with the Department of Environmental Resources, the EPA began emergency removal activities which included the removal and securing of all materials and conditions on the Drake site that could pose an imminent hazard. (U)

32. The Drake Chemicals site was one of the most hazardous sites the EPA has undertaken to clean up to this date under the Act's program.

33. An Emergency Response Team of the EPA was involved and on site during major portions of the removal activities at the Drake site. (U)

34. The Emergency Response Team provided technical and scientific assistance to the On Scene Coordinator. (U)

35. Also involved in the cleanup of the Drake site was a Technical Assistance Team which provided logistical and

technical support to the EPA. (U)

36. The On Scene Coordinator utilized the Technical Assistance Team to obtain information from outside sources on chemical waste disposal methods.

37. On February 28, 1982, the EPA, through its On Scene Coordinator, signed an agreement with OH Materials captioned "Notice to Proceed with Emergency Response to Hazardous Substance Release" (hereinafter "Notice to Proceed"). (U)

38. The EPA hired OH Materials as its prime contractor at the Drake site as a result of OH Materials' expertise in chemical waste disposal techniques.

39. The Notice to Proceed is a preliminary contractual instrument which represents a time and materials contract whereby payment for contractor services is made on the basis of direct labor hours at fixed hourly rates and materials, subcontractor, and travel costs. (U)

40. Pursuant to the Notice to Proceed the On Scene Coordinator retained responsibility for determining what would be done, the means and methods employed in disposing of waste, and the contractor's expenditures for material and manpower.

41. The Notice to Proceed provided that OH Materials was to furnish the necessary personnel, materials, services, facilities and otherwise do all things necessary for or incident to the performance of the work set forth in the "Scope of Work" contained in the Notice to Proceed.

42. The On Scene Coordinator was responsible for directing and monitoring the activities of OH Materials at the Drake Site.

43. The duties of the On Scene Coordinator at the Drake site included:

A. Making assignments of major tasks to the various contractors on site;

B. Consulting with independent experts such as private agencies, Emergency Response Team, Pennsylvania Department of Environmental Resources and

the Technical Assistance Team regarding technical solutions to the cleanup problem.

C. Approval of task execution.

D. Acceptance of task completion.

E. Cost control.

44. Dr. Joseph P. Lafornara, at the time acting chief of the Analytical Support Section, EPA Emergency Response Team, was at the Drake site on March 3 through March 5, 1982, and on March 30, 1982.

45. Andre P. Zownir, EPA Emergency Response Team environmental engineer, was at the Drake site on March 3-5, 8-12, and 17-19, 1982. (U)

46. Bruce Potoka, EPA environmental scientist, was at the Drake site on March 3-5, 8-11, and 15-20, 1982. (U)

47. Thomas Massey, EPA On Scene Coordinator, was at the Drake site on March 2-5, 8-11, and 17, 1982. (U)

48. Benton Wilmouth, EPA On Scene Coordinator, was at the Drake site on March 3-5, 9-12, and 15-24, 1982. (U)

49. Jack Downey, EPA On Scene Coordinator, was at the Drake site March 4, 5, 8-10, 21-24, 1982 (U)

50. All actions of EPA, referenced herein, were performed by EPA employees, acting within the scope of their respective employment. (U)

51. The On Scene Coordinator assigned to the Emergency Response Team the task of preparing at site safety plan.

52. The On Scene Coordinator at the Drake site was responsible for coordination of the implementation of the site safety plan to ensure that workers and regulatory personnel conducted their operations in a safe manner.

53. One of the most serious hazards existing at the Drake site was a tank containing oleum. (U)

54. Oleum is the common name for $H_2SO_4+SO_3$. It is concentrated sulfuric acid with the sulfate radical dissolved in it at 30-70% levels. (U)

55. Oleum is extremely reactive with a wide range of

compounds and is extremely sensitive to moisture, producing a fuming reaction caused by the reaction of water and the sulfate radical. (U)

56. The oleum on the Drake site was stored in a carbon steel tank having a total capacity of approximately 5,000 gallons. (U)

57. The tank was an old railroad tank car which had its wheels removed.

58. When oleum is stored in a carbon steel tank, the sulfate radical will slowly react with the tank's side walls, producing iron sulfate salts which fall to the bottom of the tank as a sludge. (U)

59. The oleum tank was sitting on two concrete pedestals. (U)

60. The pedestals were approximately eight feet tall.

61. The oleum tank was over seven feet tall from the bottom of the tank to the top of the manway (aperture).

62. At the time of commencement of the removal activities at the Drake site the oleum tank was venting directly into the atmosphere and posed a major threat of fire, explosion or release of pollutants into the air. (U)

63. The On Site Coordinator determined that before the hazard posed by the oleum tank could be addressed, the amount of materials contained in the tank had to be assessed. (U)

64. On or before March 8, 1982, the On Scene Coordinator assigned OH Materials the task of determining the quantity of oleum contained within the oleum tank. (U)

65. OH Materials performed this task through a method known as "sticking" where a dipstick or rod is inserted into the material to determine its depth. (U)

66. Visual assessment of the contents of the oleum tank was hampered by the fumes emanating from the tank. (U)

67. Accurate assessment of the contents of the oleum tank was difficult because the tank was on pedestals.

68. OH Materials personnel reported to the On Scene

Coordinator that the tank contained four inches of sludge and two inches of liquid oleum. (U)

69. It was estimated that the tank contained approximately 110 gallons of product. (U)

70. The On Scene Coordinator knew of the method employed in assessing the contents of the oleum tank.

71. The On Scene Coordinator was advised by OH Materials personnel that the tank could possibly contain sludge build-up at the ends of the tank which would mean that the actual volume of oleum in the tank was greater than the estimated volume.

72. The 110 gallons of oleum initially estimated to be contained within the tank was a sufficient quantity of oleum to produce a substantial release of acid, posing hazards to the public.

73. The On Scene Coordinator, Environmental Response Team personnel, Technical Assistance Team personnel, Department of Environmental Resources personnel, and OH Materials personnel discussed appropriate methods of disposing of the oleum. (U)

74. Thomas Massey, Dr. Joseph Lafornara, and Andre Zownir were EPA employees involved in decision making concerning methods to be employed in neutralization and disposal of the contents of the oleum tank on the Drake site. (U)

75. OH Materials personnel suggested to the On Scene Coordinator that the oleum tank be removed from its pedestals prior to neutralization. (U)

76. OH Materials personnel suggested to the On Scene Coordinator that the oleum tank be removed from the site to a remote location prior to neutralization of its contents. (U)

77. OH Materials personnel also suggested as another option that the oleum tank be placed on the ground at the rear of the Drake site prior to neutralization.

78. The On Site Coordinator rejected these recommendations. (U)

79. In considering OH Materials' suggestion that the tank be removed from the pedestals, the On Scene Coordinator considered the potential risks posed by an attempt to remove the tank.

80. The On Scene Coordinator considered factors such as the questionable stability of the tank and that no assurances could be given by OH Materials that the tank would not rupture or explode either during the removal process or during the attempt to relocate the tank.

81. Because of its location and the lack of specific information on ~~the tank~~'s age or previous use, it was difficult readily to determine the structural integrity of the tank or to guage its stability on the pedestals.

82. The On Scene Coordinator ordered no investigation into the structural integrity of the oleum tank before rejecting OH Materials' recommendation of removing the tank from its pedestals prior to neutralization.

83. The risk of moving the tank by crane could have been minimized by placing the tank in a cradle while it was being lifted off its pedestals.

84. The oleum tank could then have been placed in a box on a truck designed to contain any oleum released from the tank during transportation.

85. The oleum tank could then have been placed at the rear of the site in a pre-dug ditch and rotated so that its manway (aperture) was facing in a generally horizontal position.

86. The tank could then have been covered with dirt, leaving the manway exposed, so as to minimize any movement of the tank during neutralization.

87. After assessing the risks and benefits of removing the tank from the pedestals, the On Scene Coordinator determined that it was safer to neutralize the tank on the pedestals. The following are some of the reasons why the On Scene Coordinator rejected OH Materials' recommendation of moving the tank:

(a) There was a possibility that the tank would rupture or

explode during its removal and relocation on-site;

(b) the soil at the rear of the site, the area OH Materials suggested as the appropriate place for neutralizing the oleum tank, was unstable since it was believed to contain filled-in abandoned lagoons of chemicals;

(c) the area at the rear of the site was close to the American Chemical Plant;

(d) there was a possibility that the tank would rupture or explode during its relocation off-site and cause serious harm to the surrounding population and property.

88. On or before March 8, 1982, the On Scene Coordinator directed that the oleum be neutralized in place. (U)

89. Once the decision was made to neutralize the oleum tank on its pedestals, the On Scene Coordinator assigned OH Materials the task of recommending a procedure for the neutralization.

90. OH Materials recommended to the On Scene Coordinator that a proper procedure for neutralizing the tank was slowly to drain all of the liquid oleum from the tank through the bottom valve into a container of water. This process would allow the neutralization of the oleum in a controlled fashion. Following completion of the draining of the liquid oleum, the sludge could then be neutralized by slowly adding water to the tank and allowing it to react with the oleum-impregnated sludge. The tank could then be drained following the completion of the chemical reaction. This process would be repeated until all of the sludge was neutralized.

91. The On Scene Coordinator, Emergency Response Team personnel, Technical Response Team personnel, Department of Environmental Resources personnel, and OH Materials personnel discussed the neutralization procedures suggested by OH Materials.

92. The On Scene Coordinator approved the neutralization method suggested by OH Materials and authorized OH Materials to proceed with the neutralization.

93. On March 4, 1982, Jay E. Ort, a hydrogeologist employed by the Commonwealth of Pennsylvania, issued a report entitled "Recommendations on Meterological Controls at Drake Chemicals."

94. In that report, Mr. Ort recommended that the more hazardous operations at the Drake site, such as those involving the oleum, should be done with a north wind in excess of 3 knots on a bright sunny day.

95. EPA was in possession of Mr. Ort's report and recommendations prior to March 15, 1982.

96. EPA was on notice of the contents of Ort's report and recommendations prior to March 15, 1982.

97. The method employed in neutralizing the oleum initially involved draining all liquid oleum from the tank through a valve at the bottom of the tank. (U)

98. Then water was added to the tank, half a cup or less at a time. (U)

99. The free-flowing liquid was then allowed to drain out of the valve at the bottom of the tank. (U)

100. The free-flowing liquid was allowed to drain in a controlled quantity into a tank of water, producing neutralization of the oleum. (U)

101. A thimbleful of the oleum draining from the tank would react with the water in the tub below the tank with sufficient force so as to shake the tub and its contents weighing over 4,000 lbs.

102. On March 15, 1982, while this operation for oleum neutralization was being conducted, a packing nut on the valve through which the oleum was draining came loose. (U)

103. As a result of the loosening of the packing valve, an uncontrolled flow of oleum commenced from the valve into the water tub below.

104. Approximately one quart to one gallon of oleum dropped into the water tub below the oleum tank.

105. OH Materials personnel immediately tightened the valve, stopping the flow of oleum into the water. (U)

106. The oleum hitting the water tub produced a dense cloud of sulfur trioxide, sulfuric acid droplets, mist, and aerosol. (U)

107. The acid cloud migrated off-site. (U)

108. Five Pennsylvania Department of Transportation workers working on Second Avenue in Lock Haven were exposed to the acid cloud on March 15, 1982. (U)

109. The Pennsylvania Department of Transportation workers suffered respiratory distress.

110. Following the release of March 15, 1982, the On Scene Coordinator, OH Materials, and others discussed the cause of the release.

111. Following the acid release of March 15, 1982, OH Materials did not state any objections to the EPA regarding the continued neutralization of the oleum tank in the manner originally approved by the the On Scene Coordinator.

112. It was concluded that the neutralization activities previously used should continue.

113. Following the acid release of March 15, 1982, the On Scene Coordinator instructed OH Materials to continue oleum neutralization in the manner originally approved by the On Scene Coordinator. (U)

114. In the regular course of the EPA's business on the Drake site, the On Scene Coordinator regularly prepared Pollution Reports documenting the situation, actions taken and future plans for the removal action. (U)

115. The Pollution Reports were prepared at or about the time of the events they record. (U)

116. Pollution Report No. 13, dated March 16, 1982, states: "If conditions are acceptable continue with work on Oleum tank No. 26." (U)

117. Pollution Report 14, dated March 17, 1982, states: "Work on Oleum tank #26 if gas line has been repaired."

118. After March 15, 1982, OH Materials continued gradually to add water to the oleum tank. (U)

119. The product was then drained through the bottom of the tank. (U)

120. While the tank was being filled with water, firemen from the Lock Haven Fire Department directed fire hoses on the tank to cool the tank as the neutralization process was being performed. (U)

121. Personnel of the Department of Environmental Resources monitored air quality during the neutralization activities on the oleum tank.

122. When evidence of reaction between water and the contents (i.e. fuming) ceased, the tank was filled half-full of water. (U)

123. The tank was then allowed to stand for six hours, with no reaction being noted. (U)

124. The tank was then completely filled with water and allowed to stand overnight. (U)

125. The contents of the tank were then drained through the valve at the botom of the tank. (U)

126. The valve at the bottom of the tank had become clogged with sludge on previous days.

127. The EPA was aware that the valve had become clogged with sludge on previous days.

128. On March 23, 1982, drainage ceased because of sludge blocking the valve at the bottom of the tank. (U)

129. To clear the sludge from the valve and allow drainage to continue, OH Materials personnel inserted rods through the manway at the top of the oleum tank. (U)

130. The rods were inserted with the knowledge of the EPA.

131. Following this insertion of rods through the manway, on March 23, 1982, at 3:57 P.M., a steam explosion occurred in the oleum tank. (U)

132. A large cloud of sulfer trioxide and sulfuric acid, in the form of droplets, mist and aerosol, vented out of the manway at the top of the tank. (U)

133. The release occurred over approximately a 15 second span. (U)

134. The release was punctuated by three distinct explosions. (U)

135. The cloud of sulfer trioxide and sulfuric acid rose approximately 40 to 50 feet into the air.

136. The oleum tank bounced approximately one inch off its pedestals several times during the course of the explosive release of March 23, 1982.

137. The oleum tank displayed no apparent damage from the explosion.

138. South-southwest winds were prevailing on March 23, 1982, blowing generally north-northeast. (U)

139. Blown by the wind, the acid cloud released from the oleum tank migrated off site into the City of Lock Haven.

140. The acid cloud of March 23, 1982, caused surface damage to over 500 motor vehicles, damaged an airplane, and damaged several buildings. (U)

141. On behalf of OH Materials, U.S.F. & G. paid claims totalling $133,296.27 arising out of the release of the acid cloud of March 23, 1982.

142. U.S.F. & G. hired Crawford and Company to adjust the claims arising out of damage caused by the acid cloud of March 23, 1982.

143. The hiring of Crawford and Company facilitated the prompt settlement of property damage claims arising out of the acid release incident of March 23, 1982.

144. On March 24, 1982, the On Scene Coordinator met with officials from the Department of Environmental Resources, and agreed that work prone to release of vapors would be done only on good dispersion days between 10:00 A.M. and 5:30 P.M., and on days when the wind was not blowing toward the City. (U)

145. Following the incident of March 23, 1982, the interior of the oleum tank was inspected through the use of mirrors and a camera. (U)

146. Visual inspection and photographic examination of the inside of the tank showed a residual crust line

approximately halfway up the side of the tank. (U)

147. Based on the acid release of March 23, 1982 and the investigation conducted subsequent to the release, it can reasonably be concluded that the tank was roughly one-half full of 65% oleum. (U)

148. It is estimated that in the March 23, 1982 release incident, approximately 2,000 gallons of oleum reacted with 2,000 gallons of water to produce 4,000 gallons of 80% sulfuric acid. (U)

149. In the March 23, 1982 release incident, approximately 2,000 gallons of 80% sulfuric acid were vented through the manway of the tank.

150. Removing the oleum tank from the pedestals on which it sat and placing it on the ground at the rear of the site prior to neutralization would have had the following advantages over performing the neutralization with the tank on its pedestals:

A. The contents of the tank could have been more accurately and easily measured;

B. The contents of the tank could have been removed manually more easily prior to neutralization;

C. Fire hoses could have been more effectively utilized to hose down any acid clouds released assuming that the firemen would utilize their hoses in the event of an explosion of the magnitude involved in the March 23, 1982 incident;

D. Rotating the tank roughly 90 degrees along its longitudinal axis, as could have been done if the tank had been placed on the ground, would have diminished the amount of the sludge in the tank coming in contact with the water placed into the tank, thereby diminishing any reaction between water and sludge.

151. The risk to the surrounding population of the oleum neutralization operation would have been reduced by conducting the operation only in periods when north winds prevailed.

152. The United States EPA knew or should have

known that the work of OH Materials at the Drake site involved a special danger to the public, inherent in the work, and was likely to create during its progress a peculiar risk of physical harm to the public unless special precautions were taken.

153. U.S.F. & G. timely filed a claim with the EPA, seeking administrative settlement in the amount of $152,291.25, pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. §1346(b) and 2671, et seq. (U)

154. That claim was rejected by decision dated March 21, 1984. (U)

155. At no time did U.S.F. & G submit a claim to the EPA for a precise amount of damages regarding the personal injuries which occurred as a result of the acid cloud release of March 15, 1982.

III. Discussion

A. The Discretionary Function Exception.

The United States argues that the conduct of the EPA in cleaning the oleum tank was a discretionary function and, therefore, the United States cannot be held liable under the Federal Tort Claims Act, 28 U.S.C. §2671, et seq., for any negligence which may have been involved in the cleanup of the Drake Site. We previously considered this argument in conjunction with a motion for summary judgment and by an opinion dated April 16, 1986 held that the discretionary function exception does not apply in this case. We refer the reader to that opinion for our analysis of the issue. After hearing the evidence, our view has not changed.

The decision by the United States to undertake to clean up the Drake site would fall within the discretionary function exception; however, this is not the decision which is being challenged in this case. The decision challenged involves the selection of the method used to remove the hazard posed by a tank containing oleum, a substance highly reactive to water. Perhaps the United States could have ignored the Drake site, but once it chose to clean up the hazardous wastes there, its decisions regarding the

procedures to be followed were not of the nature and quality that Congress intended to shield from tort liability. United States vs. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 104 S. Ct. 2755 (1984). The United States argues that it cannot be held liable for any incidents which occurred as a result of the initial decision to clean up the Drake site. The results of such a broad interpretation of the discretionary function exception could lead to results which Congress did not intend. The United States must be held accountable for the acts of its workers who carry out tasks on an operational level. The On Scene Coordinator's role in the cleanup operation was such that his conduct is not excluded from a claim brought pursuant to the Federal Tort Claims Act.

B. The Acid Cloud Release of March 15, 1982.

Five Pennsylvania Department of Transportation employees were injured as a result of the release of a cloud of sulphuric acid on March 15, 1982 during the neutralization of the tank containing oleum. U.S.F. & G. is subrogated to the personal injury claims of these workers and argues that the United States' negligence was the cause of the injuries. The United States asserts that this Court lacks jurisdiction over the personal injury claims because U.S.F. & G. failed to file an administrative claim which complied with the Federal Tort Claims Act, 28 U.S.C. §2675. This section provides that

> (a) An action shall not be instituted upon a claim against the United States for money damages for...personal injury...caused by the negligent or wrongful act or omission of any employee of the Government...unless the claimant shall have first presented the claim to the appropriate Federal agency...
>
> (b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of

> presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

28 U.S.C §2675.

The purpose of requiring tort claims to be filed first with the appropriate federal agency is to lessen the burden upon the federal courts by permitting the agencies to settle such claims pursuant to 28 U.S.C. §2672. Title 28 of the Code of Federal Regulations at §14.2(a) provides that

> For purposes of the provisions of 28 U.S.C. §2401(b) and 2672, a claim shall be deemed to have been presented when a Federal agency receives from a claimant...an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident. (emphasis added)

It is undisputed that on or about June 14, 1982, U.S.F. & G. submitted a Standard Form 95 which claimed damages solely for the accident of March 23, 1982. By letter dated January 11, 1983, U.S.F. & G. first notified the United States of the five personal injury claims arising out the March 15, 1982 accident. The specific sums for damages claimed by U.S.F. & G. in its correspondence with the United States did not include the $5,000 currently being claimed for these personal injuries. It is undisputed that at no time did U.S.F. & G. submit a claim to the EPA for a precise dollar amount of damages regarding the personal injuries. U.S.F. & G. did not comply with the requirements of 28 C.F.R. §14.2 and 28 U.S.C. §2675; therefore, this Court lacks jurisdiction over the personal injury claims. 28 U.S.C. §2675(a); Bialowas vs. United States, 443 F. 2d 1047 (3d Cir. 1971).

U.S.F. & G. agrues that there is precedent for permitting it to present its personal injury claims in conjunction with the claims which have properly been pursued at the

administrative level. We have reviewed the authorities cited by U.S.F. & G. and find that none support U.S.F. & G.'s argument. In the case of Tucker vs. United States Postal Service, 676 F.2d 954 (3d Cir. 1982) the Court of Appeals held that a Form 95 was sufficient for purposes of the Federal Tort Claims Act despite the fact that Plaintiff failed to forward itemized medical bills. The facts in Tucker are quite different from those in this case because in Tucker the Plaintiff included the amounts claimed for personal injury and property damage in her Form 95. As stated above, U.S.F. & G. has not submitted an administrative claim containing the amounts demanded for personal injuries arising out of the March 15, 1982 accident. U.S.F. & G. has failed to set forth facts sufficient to establish that there has been newly discovered evidence or intervening facts which entitle it to have the personal injury claims heard by this Court pursuant to 28 U.S.C. §2675(b). We will enter an order dismissing without prejudice for lack of jurisdiction the personal injury claims asserted by U.S.F. & G.

C. The Acid Cloud Release of March 23, 1982. –

U.S.F. & G. asserts that the United States is liable for the property damage which occurred as a result of the acid cloud release of March 23, 1982 based upon the theory of negligence. In order to maintain an action in negligence, the Plaintiff must prove the existence of a legal duty flowing from the Defendant to the Plaintiff, a breach of that duty, and a causal connection between the breach and the injury. Morena vs. South Hills Health System, 462 A.2d 680, 501 Pa. 634 (1983). The United States owed the public the duty of reasonable care under all the circumstances, and reasonable care where a hazardous activity is involved is a higher degree of care than would be required in the performance of ordinary activities. Koelsch vs. The Philadelphia Company, 152 Pa. 355, 362, 25 A. 522, quoted in Maternia vs. Pennsylvania Railroad Company, 56 A. 2d 233, 235, 358 Pa. 149, 153 (1938).

U.S.F. & G. argues that the United States breached its

duty of care in three respects. First, U.S.F. & G. asserts that the United States was negligent in its failure to accept OH Materials' recommendation that the oleum tank be removed from its pedestals before neutralization was attempted. The relevant question is whether or not the EPA's decision to add water to the tank while it was on pedestals was reasonable based upon information known to the EPA at the time the decision was made. The EPA relied upon OH Materials' estimate that there were 110 gallons of oleum in the tank. We now know that there were approximately 2,000 gallons of oleum in the tank. OH Materials did not give OH Materials any reason to believe that its estimate of 110 gallons was incorrect. OH Materials is a company specializing in the cleanup and disposal of hazardous waste. In our view it was reasonable for the On Scene Coordinator to rely on OH Materials' estimate.

Based upon the estimate that the tank contained 110 gallons of oleum and faced with the options of neutralizing it either off site, at another location on site or on its pedestals, the On Scene Coordinator chose to neutralize the tank on its pedestals. The tank car was old and could have ruptured in transit, causing a more serious accident than the one which occurred. The presence of snow and ice on the site increased the risk of a serious hazard if the tank were to rupture. The on site location to which OH Materials proposed to move the tank was in close proximity to another chemical plant and if a fire had commenced during the neutralization of the tank there was a risk that the other chemical plant could have been affected, thus causing greater chemical hazards to the public. It was unclear that the ground at the site OH Materials proposed to use was not weakened by the presence of abandoned chemical pits. For these reasons, the On Scene Coordinator's decision not to attempt to move the tank before neutralizing it was reasonable.

U.S.F. & G. has presented evidence that it would have been safer to perform the neutralization with the tank on its

side at a location on the ground where bulldozers and fire hoses could have more easily contained any release that might have occurred. At this time there is more information than there was at the commencement of the cleanup of the Drake site in support of placing the tank on the ground before neutralization. For example, we now suspect that the tank could have withstood the stress of being moved by crane and truck because it withstood the force of the explosions of March 23, 1982. However, information now available to the EPA is not relevant to the reasonableness of the EPA's choice. This choice was reasonable, based upon information available at the time the choice was made.

Even if this Court had concluded that the On Scene Coordinator's choice of the method of neutralization was negligent, we would not find the EPA liable because U.S.F. & G. has failed to establish a causal connection between the decision not to move the tank and the accident which occurred. Negligent conduct is a cause of injury if it is a substantial factor in bringing about the injury. Restatement (Second) of Torts §431; Whitner vs. Von Hintz, 437 Pa. 448, 263 A.2d 889 (1970). Plaintiff need not show with absolute certainty that the negligence caused the injury. Rosario vs. American Export-Isbrandtsen Lines, Inc., 395 F. Supp. 1192-1210 (E.D. Pa. 1975). The element of causation would be met if Plaintiff showed a substantial possibility that the harm could have been avoided and that the negligence eliminated the possibility of avoiding the harm. ID. U.S.F. & G. has failed to show that there is substantial possibility or even that it is more likely than not that there would have been no release of an acid cloud had the oleum tank been taken off the pedestals. One of the U.S.F. & G.'s witnesses testified in answer to this Court's questions that releases during hazardous waste cleanups are common. The tank contained a large quantity of oleum sludge which created a very volatile situation. U.S.F. & G.'s expert witness, Samuel Insalaco, testified in response to this Court's questioning that he could not say that the tank

would not have exploded had the tank been removed. Removing the oleum from the tank involved such great danger that it is entirely possible an accident of equal or greater seriousness might have occurred if the tank had been moved; therefore, the causal connection between acts asserted to be negligent and the occurrence of the accident has not been proved.

U.S.F. & G.'s second argument is that the United States was negligent in continuing after the March 15, 1982 accident to neutralize the oleum by adding water to the tank. It is unclear from the evidence why the same method of neutralization was used after the March 15, 1982 accident as was used before the accident. Nor did the evidence clarify whether once water had been added to the tank it was too late to commence the use of a different method of neutralization. There was no evidence that after March 15, 1982 accident OH Materials warned or advised the United States to try a different method of neutralization such as adding sulfuric acid or removing the tank from its pedestals. Based upon the evidence presented at trial, we cannot conclude that the United States was unreasonable in continuing to direct the neutralization of the tank in the same method used both before and after the March 15, 1982 accident.

U.S.F. & G.'s third argument is that the United States breached its duty of care by conducting the neutralization of the tank without regard to wind conditions. The area to the north, west and northeast of the Drake site was much more heavily populated than the area to the south, southeast and east of the site. It is undisputed that the wind was blowing in the direction of the City of Lock Haven on March 23, 1982. Had the wind been blowing in the opposite direction on that date much less property damage would have occurred. In conducting a cleanup of materials which could explode and release hazardous chemicals into the air, the entities responsible for the cleanup have the duty to take all reasonable precautions so as to protect public

safety. One of the most basic of these precautions is to monitor the direction of the wind and to perform operations which could result in the release of hazardous materials into the air when the wind is blowing away from heavily populated areas. There was no expert testimony regarding whether it would be safe to perform such operations when there is no wind and we will not speculate on this point. It is conceivable that under certain circumstances the hazard posed by a tank would be so great that removal operations would have to proceed immediately and without regard to wind conditions, but this case did not present such a situation. There is no evidence that the neutralization operations would have been more dangerous had the addition of water, draining of the tank, unclogging of the valve, and other procedures involved in the neutralization been delayed so as to be performed on days with favorable wind conditions.

It could be argued that the parties did not have the duty to take wind into account in directing the neutralization of the oleum tank because at the commencement of the neutralization the quantity of oleum in the tank was inaccurately estimated to be 110 gallons. In our view, oleum is such a dangerous substance that 110 gallons of it should not have been neutralized without regard for the wind conditions.

The question arises whether the United States or OH Materials had the responsibility for considering the wind conditions during neutralization. The parties do not dispute that OH Materials was acting as an independent contractor. The United States cannot be held liable under the Federal Tort Claims Act for the negligence of its independent contractors. 28 U.S.C. §1346(b), §2671; United States vs. Orleans, 425 U.S. 807, 813-814 (1976); Logue vs. United States 412 U.S. 521, 527 (1973). Nor can the United States be held liable under the Federal Tort Claims Act on principles of strict liability for damage arising out of the performance of ultrahazardous activities. Laird vs. Nelms,

406 U.S. 797, 801 (1972). Thus, OH Materials must prove negligence on the part of the United States in order to recover.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §9601, et seq. ("The Act") assigns to the President who has delegated to the EPA responsibility for conducting cleanup operations such as the one performed at the Drake Site. The EPA has the power to delegate certain tasks to independent contractors; however, in this case the EPA retained ultimate authority to select the cleanup methods and supervise the cleanup operations. The EPA retained a certain amount of control over the safety procedures to be followed during the cleanup as evidenced by the fact that OH Materials was not entirely free to do the work in any manner it chose. DiSalvatore vs. United States, 456 F. Supp. 1079 (E.D. Pa. 1978).

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts §414. The EPA knew of a report prepared by J. E. Ort, a hydrogeologist employed by the Commonwealth of Pennsylvania in which Mr. Ort recommended that the more harzardous operations at the Drake site, such as those involving the oleum, be performed with a north wind in excess of 3 knots on a bright sunny day. Even if the EPA had not been aware of this report, it should have been aware of the importance of paying attention to wind conditions. The EPA knew that neutralization of the oleum tank involved a special danger to the public and should have done everything within its power to minimize the risk of harm to the public by taking precautions such as instructing OH Materials to perform hazardous operations on days with favorable wind con-

ditions and checking to see that OH Materials followed such instructions. The EPA did not direct OH materials to pay attention to wind conditions nor did the EPA take the necessary precautions itself until after the accident of March 23, 1982. On March 24, 1982, the EPA decided that work prone to release of vapors would be done only on days when the wind was not blowing toward the city. This decision should have been made before neutralization of the oleum tank began. Clearly, the EPA breached its duty of care before March 24, 1982 in permitting neutralization to proceed without regard to wind conditions.

We next address the question of OH Materials' responsibility for considering the wind conditions during neutralization. The contract between the EPA and OH Materials provides that OH Materials shall furnish the "...necessary personnel, materials, services, facilities, and otherwise do all things necessary for or incident to the performance of the work" described in the document entitled "Scope of Work". Plaintiff's Exhibit P-2. It appears to this Court that there is no reference in the Scope of Work to the oleum tank; however, included in the Scope of Work is the following sentence: "The contractor shall be responsible for the staging and preparation for disposal of all waste containing drums on site, as determined by the OSC or his designee." It is possible that the parties intended the term "drum" to include the oleum tank. Despite the apparent vagueness of the contract, OH Materials and the EPA viewed the cleanup of the oleum tank as within the scope of work to be performed by OH Materials. It could be said that the parties orally and through their conduct modified the contract so as to provide that OH Materials be responsible for cleaning the tank. Bernhart vs. Dollar Rent A Car Systems, Inc., 595 F.2d 914 (3d Cir. 1979); Appalachian Power Co. vs. Federal Power Commission, 529 F.2d 342, 350 (D.C. Cir. 1976), cert. denied, 429 U.S. 816. Given that OH Materials was responsible under the contract for cleaning the oleum tank we return to the language at page

one of the contract which states that OH Materials "...shall furnish the necessary...services...and otherwise do all things necessary for or incident to the performance of the work.." Plaintiff's Exhibit P-2. In our view, considering wind conditions was a necessary aspect of performing the cleanup of the oleum tank. OH Materials was responsible for devising the plan for neutralization of the oleum tank and although OH Materials did not have the power to make final determination of the neutralization method used, it did have a duty properly and safely to perform the operations which it undertook. OH Materials should have checked the wind direction and accordingly timed procedures such as inserting rods into the tank, adding water to the tank, and taking other steps which increased the risk that dangerous substances would be released so that these procedures would not take place when the wind was blowing toward Lock Haven. The decisions regarding the day to day operations at the oleum tank were reached during meetings between officials of the EPA and of OH Materials. There was no evidence that OH Materials ever advised the EPA that either OH Materials or the EPA should refrain from performing the most hazardous operations when the wind was blowing in the direction of Lock Haven. OH Materials breached its duty of care before March 24, 1982 in conducting neutralization of the oleum tank without regard to wind conditions.

U.S.F. & G argues that the United States should be held liable for actions of OH Materials under principles set forth in sections 413, 416, 427 and 427A of the Restatement (Second) of Torts. These sections contain exceptions to the general rule that an employer is not liable for the negligence of its independent contractor. We are not persuaded by U.S.F. & G.'s attempt to distinguish the principles described in sections 413, 416, 427 and 427A of the Restatement from strict liability or vicarious liability. The doctrine which U.S.F. & G. wishes us to apply essentially states that an employer is liable for the negligence of the

independent contractor irrespective of whether the employer has been at fault. Gibson vs. United States, 567 F.2d 1237, 1244 (3d Cir. 1977). The Court of Appeals has rejected sections 416 and 427 of the Restatement (Second) of Torts as a basis for recovery under the Federal Tort Claims Act. Id. Whether this doctrine is labelled strict liability or vicarious liability, it is not properly a basis for recovery against the United States under the Federal Tort Claims Act. Gibson vs. United States, 567 F.2d 1237 (3d Cir. 1977); Laird vs. Nelms, 406 U.S. 797 (1972).

It could be argued that OH Materials' erroneous estimate of the quantity of oleum in the tank and not the parties' inattention to wind was the cause of the damage. It does not appear from the evidence that any more attention would have been paid toward wind conditions had the parties known that the tank contained 2,000 gallons of oleum instead of 110 gallons. The fact that the neutralization of the tank proceeded on March 23, 1982 while the wind was blowing toward Lock Haven was a substantial factor in bringing about the property damage which occurred.

Having concluded that both the EPA and OH Materials were negligent in failing to take wind into account with regard to the neutralization of the oleum tank and that their combined negligence was a substantial factor in bringing about the damage, we address the question of their respective causal negligence. OH Materials was an expert in cleaning up hazardous waste, knew or should have known of the importance of paying attention to wind conditions and should at least have raised this point with the EPA. However, OH Materials did not have the power to make final decisions regarding the cleanup operations. The EPA's negligence was a greater cause of the damages than that of OH Materials because the EPA retained the ultimate power to make decisions regarding the cleanup operations. In our view, 40% of the causal negligence is attributable to OH Materials and 60% of the causal negligence is attributable to the EPA for the property damage which occurred as

a result of the accident of March 23, 1982 during the cleanup of the oleum tank.

U.S.F. & G. argues that it is entitled to indemnity or contribution from the United States. In support of its request for indemnity, U.S.F. & G. cites section 886B of the Restatement (Second) of Torts which provides:

> Indemnity between tortfeasors.
>
> (1) If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability. . .

The comments regarding the history of section 886B of the Restatement provide that "A suit for indemnity is brought to recover the total amount of the payment by the plaintiff, on the ground that the plaintiff's conduct was not as blameworthy as the defendant's..."Restatement (Second) of Torts, §886B, Comments. U.S.F. & G. argues that indemnity is appropriate because the United States is strictly liable or because OH Materials acted in obedience to the directions of the United States. We have held that strict liability cannot form the basis for recovery under the Federal Tort Claims Act. Laird vs. Nelms, 406 U.S. 797 (1972). Further, OH Materials had its own duty to consider wind conditions. Both OH Materials and the United States were negligent and should share the cost of the damages; therefore, the proper means for OH Materials to recover is through contribution.

The United States argues that contribution is not available to U.S.F. & G. because the United States is secondarily liable and OH Materials is primarily liable for the damages caused by the March 23, 1982 accident. The United States cites the case of Burbage vs. Boiler Engineering & Supply Co., Inc., 249 A2d 563, 433 Pa. 319, 326-327 (1969) as authority for this proposition. The distinction between primary and secondary liability is not based on a difference in degree of negligence or upon comparative

negligence; rather, it is based on a difference in the character of the wrongs and the duty owed by each of the tortfeasors. Id.

> Secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal obligation between the parties or arising from some positive rule of statutory or common law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.

Id. at 327. Both OH Materials and the EPA had the duty to consider wind direction in performing the cleanup. The EPA had the duty to make sure the independent contractor followed all necessary safety precautions and OH Materials had the duty to raise the issue of wind direction with the EPA. The EPA's duty regarding safety was not reduced by the fact that OH Materials also had a duty to take all necessary precautions. In our view, the doctrine of primary and secondary liability does not apply to the facts of this case.

In order for the Pennsylvania Uniform Contribution Among Tortfeasors Act, 42 Pa. C.S.A. §8321, et seq. ("the Act") to apply to this case, OH Materials and the United States must be joint tort-feasors. Joint tort-feasors are defined as "...two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them." 42 Pa. C.S.A. §8322. In order to determine whether parties are joint tort-feasors, courts consider factors such as the identity of a cause of action, the existence of a common or like duty, whether the same evidence will support an action against each party, the nature of the injury, identity of facts as to time, place, or result, and whether the injury is direct and immediate rather than consequential. Harka vs. Nabati, 487 A2d 432, 337 Pa. Super. 617 (1985). Both OH Materials and the United States had a duty to consider wind conditions during neutralization.

Both parties had the opportunity to guard against the other's negligence. The same evidence would support an action against each party and the injury caused by the negligence of OH Materials and of the United States is the same. Therefore, OH Materials and the United States are joint tort-feasors within the definition of the Act.

Under the Pennsylvania Uniform Contribution Among Tortfeasors Act, the non-released party is entitled to have the claim against it reduced in accordance with payments made pursuant to a release in favor of a joint tort-feasor. 42 Pa. C.S.A. §8326; Sochanski vs. Sears, Roebuck & Co., 689 F.2d 45, 48 (3d Cir. 1982). If the released party pays more than its pro rata share, the non-released party is entitled to have the claim reduced by the total amount of consideration paid under the release. Id. Thus, the United States is entitled to have a claim against it reduced in accordance with the terms of the release given to U.S.F. & G. by those whose property was damaged by the acid cloud. Because the United States's liability has been extinguished by this release, U.S.F. & G. has a right of contribution from the United States for the amount U.S.F. & G. paid in excess of its own share of liability. 42 Pa. C.S.A. §8324.

It is possible that counsel have stipulated or will stipulate to the amount of damages to be assessed in this case. Therefore, we will provide counsel the opportunity to file such a stipulation and a proposed order. If counsel are unable to reach a stipulation regarding damages, we will schedule a hearing regarding the damages phase of this case.

IV. Conclusions of Law.

1. The United States had a duty to maintain the highest degree of care, utilizing every reasonable precaution suggested by experience and the known danger, including taking into account wind conditions, in making decision concerning the methods employed in neutralizing the tank containing oleum.

2. OH Materials had a duty to maintain the highest

degree of care, utilizing every reasonable precaution suggested by experience, and the known danger, including taking into account wind conditions, in performing the neutralization of the tank containing oleum.

3. The United States breached its duty of care in failing to take wind conditions into account while supervising the neutralization of the oleum tank.

4. OH Materials breached its duty of care in failing to take wind conditions into account in performing the neutralization of the oleum tank.

5. The United State's breach of its duty of care regarding wind conditions was a substantial factor in bringing about the property damage which occurred on March 23, 1982.

6. OH Materials' breach of its duty of care regarding wind conditions was a substantial factor in bringing about the property damage which occurred on March 23, 1982.

7. 60% of the causal negligence regarding the property damage which occurred on March 23, 1982 is attributable to the United States.

8. 40% of the causal negligence regarding the property damage which occurred on March 23, 1982 is attributable to the United States.

9. Pursuant to its policy insuring OH Materials, U.S.F. & G. is subrogated to all claims of OH Materials against the United States arising out of U.S.F. & G.'s payments to the claimants suffering property damage as a result of the acid cloud release of March 23, 1982.

10. U.S.F. & G.'s payments to persons suffering property damage as a result of the acid cloud release on March 23, 1982 had the effect of protecting the United States from claims of these persons.

11. U.S.F. & G. is entitled to 60% contribution from the United States for all damages and reasonable expenses including the adjustor's expense paid as a result of the chemical release of March 23, 1982 pursuant to principles of comparative negligence.

An appropriate order will be entered.

DATED: July 3, 1986

MUIR, U.S. DISTRICT JUDGE

No. 87-1803

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES FIDELITY & GUARANTY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioner's claim that an on-scene coordinator of the Environmental Protection Agency (EPA), who was in charge of the clean-up of a hazardous waste site designated for an "immediate removal action" under the Comprehensive Environmental Response, Compensation, and Liability Act, acted negligently in directing a private contractor to proceed, notwithstanding adverse wind conditions, with the clean-up of a substance posing a major threat of fire, explosion, and release of pollutants into the air.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 837 F.2d 116. The opinion of the district court (Pet. App. 18a-48a) is reported at 638 F. Supp. 1068.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1988. The petition for a writ of certiorari was filed on April 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an insurer seeking indemnity or contribution from EPA based on the alleged negligence of EPA's on-scene coordinator in allowing a clean-up operation to proceed notwithstanding unfavorable wind conditions (Pet. App. 3a, 5a). The clean-up took place at a site designated for an "immediate removal action" under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. (& Supp. III) 9601 *et seq.* (CERCLA) (Pet. App. 3a). EPA typically directs such immediate action only if it determines that a response is necessary within hours or days in order to prevent significant harm to the public health or to the environment. In this case, EPA determined that the site posed an imminent threat of fire and explosion, as well as a threat of public contact with hazardous chemicals (*id.* at 3a). The EPA's on-scene coordinator, who directed the clean-up, hired petitioner's insuree, OH Materials, an expert in toxic waste abatement and containment, to perform the various tasks required for the clean-up (*id.* at 3a-4a).

One of the most serious hazards at the site was an old railroad tank car resting on raised concrete pedestals. The tank contained oleum, a solution of sulfur trioxide in concentrated sulfuric acid, which is extremely reactive with a wide range of compounds and sensitive to moisture. At the commencement of the removal action, the oleum tank was venting directly into the atmosphere and posed a major threat of fire, explosion and release of pollutants. Pet. App. 4a.

OH Materials suggested that the tank be removed from its pedestals and transferred to a remote location or, alternatively, placed on the ground at the

rear of the site prior to neutralization and removal of the oleum. The on-scene coordinator rejected these recommendations after considering the potential risks from moving the tank. OH Materials then suggested neutralizing the oleum in the tank by slowly draining all of the liquid oleum from the tank through the bottom valve into a container of water and allowing the oleum to react with the water in a controlled fashion. The remaining sludge inside the tank would then be neutralized by slowly adding water to the tank. Following the completion of the chemical reaction, the neutralized sludge would be drained. The on-scene coordinator approved this plan. Pet. App. 4a.

While OH Materials was performing this work, drainage stopped because the valve had become clogged with sludge. To clear the valve, OH Materials employees inserted rods through the manway at the top of the tank. Following the insertion of the rods, a steam explosion occurred in the oleum tank. A large cloud of sulfur trioxide and sulfuric acid escaped out of the manway. Blown by south-southwest winds, the acid cloud migrated into the nearby town of Lock Haven, where it caused property damage to over 500 motor vehicles, an airplane, and several buildings.[1] Pet. App. 5a.

2. Petitioner paid the claims arising from the incident (Pet. App. 5a). It then filed suit under the Federal Tort Claims Act seeking recovery for its losses (*id.* at 5a-6a). The district court found that,

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[1] Eight days prior to the mishap now in issue, another release of toxic gas occurred in connection with the clean-up of the same tank. Government liability for damages resulting from the earlier incident is not in issue here since petitioner never appealed from the district court's dismissal of this aspect of its claim. Pet. App. 5a, 6a.

while the chemical release would have occurred regardless of the wind conditions, "much less" property damage would have resulted if the wind had been blowing away from Lock Haven (*id.* at 39a). The court held the United States liable for 60% of the damages caused by the chemical release based on EPA's failure to order the contractor to cease operations when wind conditions were not favorable (*id.* at 41a-42a, 48a). The court held that the contractor was also liable since, as "an expert in cleaning up hazardous wastes, [it] knew or should have known of the importance of paying attention to wind conditions and should at least have raised this point with the EPA" (*id.* at 44a). The district court found, however, that the United States had the greater share of the liability because "EPA retained the ultimate power to make decisions regarding the cleanup operations" (*ibid.*).

The district court rejected the government's contention that the discretionary function exception (28 U.S.C. 2680(a)) barred petitioner's claim. The court held (Pet. App. 33a-34a) that, while the United States had discretion to ignore the dangerous site altogether, "once it chose to clean up the hazardous wastes there, its decisions regarding the procedures to be followed were not of the nature and quality that Congress intended to shield from tort liability." "The United States," the court stated (*id.* at 34a), "must be held accountable for the acts of its workers who carry out tasks on an operational level." The district court concluded (*ibid.*) that in this instance "[t]he On Scene Coordinator's role in the cleanup operation was such that his conduct is not excluded from a claim brought pursuant to the Federal Tort Claims Act."

3. The court of appeals reversed, holding that petitioner's claim was barred by the discretionary func-

tion exception. Relying on this Court's decisions in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), and *Dalehite* v. *United States*, 346 U.S. 15 (1953), the court noted (Pet. App. 10a) that "the dichotomy between planning level and operation level" relied upon by the district court "does not resolve the question of whether a governmental act is discretionary within the meaning of the exception." The proper focus is on " 'the nature of the conduct, rather than the status of the actor' " (*id.* at 11a (quoting *Varig Airlines*, 467 U.S. at 813)). "Acts at the operational level," the court explained (*ibid.*), "may be discretionary if planning level orders anticipate decisions at lower levels that leave room for policy judgment and decision."

"Execution of [the hazardous waste clean-up] program and accomplishment of its objective," the court noted (Pet. App. 12a), "necessarily require the setting of priorities in light of the risks presented at various sites and the finite resources available to address the problem." EPA classified the site in question here for "immediate removal action," thus indicating that "significant risks would attend a delay in cleanup" (*ibid.*). The on-scene coordinator, charged with the responsibility of directing the project, "faced the problem of when to schedule the neutralization of an oleum tank that was venting directly into the atmosphere and posed a major threat of fire, explosion, and release of pollutants into the air" (*id.* at 13a). The court of appeals recognized that the coordinator's decision had to reflect "not only the available resources and the other hazards to be neutralized on the site, but most importantly, a balancing of the risks of proceeding with the neutraliza-

tion on the day chosen against the risks of further delay" (*ibid.*).

The court of appeals stressed (Pet. App. 14a) that "[t]here was no applicable constitutional provision, statute, or regulation requiring the On Scene Coordinator to undertake removal actions only on days with favorable wind conditions." The authority delegated to the on-scene coordinator, the court stated (*id.* at 13a), "left room for, and indeed required, the exercise of policy judgment based upon the resources available and the relative risks to the public health and safety from alternative actions." The court of appeals accordingly concluded (*id.* at 14a) that the district court erred when it sought "to second-guess the On Scene Coordinator's decision."

ARGUMENT

1. The court of appeals' conclusion follows necessarily from this Court's decision in *Dalehite* v. *United States*, *supra*. In *Dalehite*, the Court applied the discretionary function exception to a fertilizer procurement and shipping program undertaken by the government in an effort to increase food production in occupied territories following the Second World War. The plaintiffs in *Dalehite* argued that the implementation of the program was negligent in a number of respects, thereby causing the explosion of a shipment of fertilizer. This Court concluded (346 U.S. at 35-36), however, that the discretionary function exception "includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion." Thus, the Court held

that the exception not only barred claims that the government was negligent in adopting the program as a whole but also claims that the government was negligent in various phases of manufacturing, packaging, labeling and shipping the product and in failing to warn those handling the fertilizer of its dangerous nature.

In this case, the government was engaged not, as in *Dalehite*, in an activity creating its own hazards, but rather, pursuant to a statutory duty, in the inherently dangerous task of cleaning up environmental hazards created by others. Under CERCLA, EPA has been given broad authority to contain and eliminate hazardous wastes.[2] This authority is not circumscribed in any significant way, and EPA clearly has broad discretion to structure individual clean-up projects, consistently with budgetary constraints, in

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[2] The Act provides, in pertinent part (42 U.S.C. 9604 (a)(1)):

> Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time * * * or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment * * *.

The authority to act under this provision has been expressly delegated to EPA. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987); Exec. Order No. 12,316, 3 C.F.R. 168 (1981 Comp.).

accordance with its own views of sound policy. For each removal action, EPA appoints an on-scene coordinator, with full responsibility to coordinate and direct the federal removal efforts (Pet. App. 20a). There are no established guidelines or manuals that control the exercise of his discretion; instead, regulations require him to consider and balance a number of factors in making clean-up decisions.[3]

In the present case, the on-scene coordinator decided to proceed immediately with "the neutralization of an oleum tank that was venting directly into the atmosphere and posed a major threat of fire, explosion, and release of pollutants into the air" (Pet. App. 13a) rather than waiting for more favorable wind conditions. That decision involved a balancing of the risks of proceeding and the risks of waiting as well as practical considerations concerning the feasibility of the project as a whole. The on-scene coordinator was required to act, based on considerations of "social, economic, and political policy" (*Varig Airlines*, 467 U.S. at 814), in accordance with his "judgment of the best course" (*Dalehite*, 346 U.S. at 34). It follows that his decision was protected by the discretionary function exception, and it is not

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[3] In fashioning an appropriate clean-up plan, the on-scene coordinator must document and evaluate pertinent facts concerning the discharge or release, such as its source and cause; the existence of potentially responsible parties; the nature, amount, and location of discharged or released materials; the probable direction and time of travel of discharged or released materials; the pathways to human exposure; the potential impact on human health, welfare and safety; the potential impact on natural resources and property which may be affected; priorities for protecting human health, welfare and the environment; and the cost of the operation. See 40 C.F.R. 300.33(b)(2).

within the province of the courts to second-guess that decision (467 U.S. at 814; 346 U.S. at 41).

2. Petitioner contends (Pet. 7-8) that there was no evidence that the on-scene coordinator actually made a policy determination to proceed with the neutralization of this particular hazard on the day in question. There is no requirement, however, that the policy considerations underlying the "determinations made by executives or administrators in establishing plans, specifications or schedules of operations" (346 U.S. at 35-36) be articulated in advance by the policy maker. As the court of appeals properly concluded, the factors and options here were clear and the on-scene coordinator made a conscious decision to proceed in face of the risks. In that decision there was ample "room for policy judgment and decision" (*id.* at 36).[4] Indeed, it is unimaginable that the decision could have been reached without such an exercise of decision-making judgment.

The district court found that this chemical plant "was one of the most hazardous sites the EPA has undertaken to clean up to this date under the Act's program" (Pet. App. 21a). The site contained more than "3,000 drums, and various reactors and tanks,

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[4] *Alabama Elec. Coop., Inc.* v. *United States*, 769 F.2d 1523 (11th Cir. 1985), upon which petitioner relies (Pet. 8-9), is not to the contrary. In that case the court held that alleged negligence by the Army Corps of Engineers in the design of a dike was not shielded by the discretionary function exception absent some indication that the design defect was the result of a policy decision. Here, the court of appeals properly concluded that the on-scene coordinator's decision to proceed in the face of the known risks "*required*[] the exercise of policy judgment based upon the resources available and the relative risks to the public health and safety from alternative actions" (Pet. App. 13a (emphasis added)).

containing hazardous chemicals" and many of these vessels were in "deteriorating condition" (*id.* at 20a). There also was ground water contamination, filled-in lagoons of chemicals, and poor air quality in the area (*id.* at 20a, 27a). The oleum tank was "[one] of the most serious hazards" (*id.* at 23a). In addition, the on-scene coordinator had a budgetary cap and a time limitation in which to complete the work (*id.* at 20a).

As the court of appeals recognized, in deciding how to schedule the clean-up operations, the on-scene coordinator was inevitably faced with "balancing the risk of proceeding with the neutralization on the day chosen against the risks of further delay" (Pet. App. 13a). He "necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to [a] specific grant of authority" (*Varig Airlines*, 467 U.S. at 820).

3. Petitioner contends (Pet. 12) that the discretionary function exception can apply only to the government's initial decision to embark on a project, not to decisions made in implementing the project. But that is plainly incorrect. As this Court clearly stated in *Dalehite*, 346 U.S. at 35-36, the discretionary function exception "includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." See also *Varig Airlines*, 467 U.S. at 811-813.

There is admittedly some disharmony among the courts of appeals in this general area. Some decisions see a material distinction between "policy" and "planning" activities, on the one hand, and "operational"

activities, on the other. These decisions stress that negligent implementation of discretionary policies and plans is not itself discretionary and therefore not within the scope of the exception, even where the alleged negligence stems from a decision concerning the proper allocation of scarce resources. See, *e.g.*, *U.S. Fire Ins. Co.* v. *United States*, 806 F.2d 1529 (11th Cir. 1986) (negligent placement and maintenance of buoys by Coast Guard); *Aslakson* v. *United States*, 790 F.2d 688 (8th Cir. 1986) (failure of power administration to elevate power lines over lake); *Henderson* v. *United States*, 784 F.2d 942 (9th Cir. 1986) (negligently exposed high voltage wires); *Alabama Elec. Coop., Inc.* v. *United States*, 769 F.2d 1523 (11th Cir. 1985) (negligent design of dike by Army Corps of Engineers); *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985) (misplacement of buoys by Coast Guard); *Eklof Marine Corp.* v. *United States*, 762 F.2d 200 (2d Cir. 1985) (mismarking of channel by Coast Guard); *SCNO Barge Lines, Inc.* v. *Sun Transp. Co.*, 775 F.2d 221 (8th Cir. 1985) (misleading information in Coast Guard navigation reports).

Other court of appeals decisions, by contrast, emphasize that operational decisions may nonetheless be discretionary, and where they are—particularly where an agency concerned with resource allocation decides to do so much, and not more, in addressing a general problem or providing a product or service—such decisions should not be second-guessed in a tort suit. See, *e.g.*, *Bowman* v. *United States*, 820 F.2d 1393 (4th Cir. 1987) (failure to erect guardrail, place warning signs or close Blue Ridge Parkway during inclement weather); *C.P. Chemical Co.* v. *United States*, 810 F.2d 34 (2d Cir. 1987) (decision

of Consumer Product Safety Commission to ban insulation manufactured by plaintiff under Consumer Product Safety Act rather than using procedures of Federal Hazardous Substances Act); *Myslakowski* v. *United States*, 806 F.2d 94 (6th Cir. 1986) (sale of used jeeps without warning of propensity to overturn in certain situations), cert. denied, No. 86-1389 (Mar. 30, 1987); *Pierce* v. *United States*, 804 F.2d 101 (8th Cir. 1986) (challenge to review process that led to allegedly wrongful termination of disability benefits); *Heller* v. *United States*, 803 F.2d 1558 (11th Cir. 1986) (FAA's allegedly wrongful denial of medical certificate to pilot); *Smith* v. *Johns-Manville Corp.*, 795 F.2d 301 (3d Cir. 1986) (sale of surplus asbestos "as is" without warnings or warranties); *Brown* v. *United States*, 790 F.2d 199 (1st Cir. 1986) (issuance of weather forecast based on incomplete information due to failure to repair or replace sporadically malfunctioning weather-reporting buoy), cert. denied, 479 U.S. 1058 (1987); *Mitchell* v. *United States*, 787 F.2d 466 (9th Cir. 1986) (decision not to mark power lines below 500 feet), cert. denied, No. 87-301 (Oct. 5, 1987); *Lindsey* v. *United States*, 778 F.2d 1143 (5th Cir. 1985) (consideration given to patent application); *Ford* v. *American Motors Corp.*, 770 F.2d 465 (5th Cir. 1985) (sale of used jeeps without warning of propensity to overturn in certain situations); *Spencer* v. *New Orleans Levee Bd.*, 737 F.2d 435 (5th Cir. 1984) (inaccurate weather forecast).

There is no clear conflict among the circuits posed by the cases in these two categories. Indeed, all circuits with decisions in the first category also have cases in the second category. While we would be prepared to argue that some of the above-cited cases

were wrongly decided,[5] we do not believe that they pose the sort of stark contrast of legal principle that weighs in favor of granting certiorari. As this Court has stressed (*Varig Airlines*, 467 U.S. at 813), "it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception." The cases in this area are highly fact-specific, and the differences appear to be more of emphasis than of principle.

More immediately, this case does not present an occasion to clarify the tension among these court of appeals decisions. The court of appeals here made it very clear that the on-scene coordinator's decision to proceed with the clean-up depended not merely on a consideration of "the resources available" but also upon a balancing of "the relative risks to the public health and safety from alternative actions" (Pet. App. 13a). The on-scene coordinator was delegated considerable discretion to make this choice based on his overall assessment of the situation. Whatever merit the distinction between policy determinations and operational decisions may have when only the proper allocation of resources to accomplish a defined objective is in question, that simplistic distinction is incapable of capturing the "nature and quality" (*Varig Airlines*, 467 U.S. at 813) of the on-scene coordinator's actions in this case.

Petitioner is also mistaken in attempting (Pet. 13) to draw a related distinction between regulatory functions—which are within the exception—and non-regulatory or proprietary functions—which are not. That distinction was expressly rejected in *Varig Airlines*. The Court in *Varig* reaffirmed *Dalehite*, which

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[5] In particular, *Eklof*, *SCNO Barge*, *Drake Towing*, and *U.S. Fire Ins.* all seem to turn the Coast Guard into an insurer of safe navigation.

applied the exception outside a regulatory context, and quoted legislative history clearly stating that " 'administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like' " fall within the exception. 467 U.S. at 809-810, 811-813 (citations omitted). "[T]he basic inquiry concerning the application of the discretionary function exception," the Court stressed, is simply whether the challenged acts involve "legislative and administrative decisions grounded in social, economic, and political policy" (*Varig Airlines*, 467 U.S. at 813-814). The decision how urgently to pursue and what risks to take in abating a severe and immediate hazard to health and safety implicates numerous concerns of "social, economic, and political policy." [6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1988

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[6] As the court of appeals expressly noted (Pet. App. 14a), there was no allegation in this case that the on-scene coordinator violated any EPA regulation governing removal actions. Thus, this case does not present any issue found in *Berkovitz* v. *United States*, cert. granted, No. 87-198 (argued Apr. 19, 1988), and there is no reason to hold this case for disposition in light of *Berkovitz*.

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